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Supreme Court of the United States

OCTOBER TERM, 1952

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No. 44

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, STEWART M. HANSON AND W. R. McENTIRE, ET AL., PETITIONERS,

vs.

WYCOFF COMPANY, INCORPORATED, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 29, 1952

CERTIORARI GRANTED JUNE 9, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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[fol. a] [Caption omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Pleas and Proceedings Before the Honorable Willis W. Ritter, Judge of the United States District Court for the District of Utah, Presiding in the Following-Entitled Cause:

WYCOFF COMPANY, INCORPORATED, a Corporation, Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, Donald Hacking and W. R. McEntire, Defendants,

and

MELVA SEAMONS and ROY HILL, d/b/a SEAMONS TRUCK LINE, and Joseph J. Milne Truck Line, Inc., a Corporation, Intervenors.

Number 1904—Civil

COMPLAINT—Filed October 10, 1950

Plaintiff complaining of the defendants, and each of them, alleges for cause of action:

(1) That the plaintiff is a Utah corporation engaged in the transportation of property for hire by motor vehicles in interstate commerce.

(2) That the defendants, Hal S. Bennett, Donald Hacking, and W. R. McEntire, are all members of the Public Service Commission of Utah.

(3) That plaintiff transports motion picture films and newsreels for various motion picture film exchanges situated in Salt Lake City, Utah, between said exchanges and motion picture exhibitors at points in Utah, Idaho and Montana, in pursuance of a Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission under docket Number MC89684 and subs and amendments thereto.

[fol. 2] (4) That the Public Service Commission of Utah issued to plaintiff and "Interstate License," No. 314, under date of August 9, 1949, by which plaintiff is authorized to transport in interstate commerce within the State of Utah motion picture films in pursuance of plaintiff's interstate commerce Certificate No. MC89684 and all subs and amendments thereto. Said Interstate License is still in full force and effect and has not been revoked or cancelled.

(5) That the transportation of motion picture film and newsreels is interstate in its character, and the Interstate Commerce Commission has, by appropriate orders, so declared such to be a fact, and has exercised its jurisdiction thereover as to authority, rates, and safety regulations.

(6) That the defendant Commission and the defendant members thereof threaten to and are attempting to stop and prevent plaintiff from transporting motion picture film and newsreels between points and places within the State of Utah, and they are thereby interfering with the conduct of interstate commerce by the plaintiff and imposing an undue burden upon interstate commerce.

(7) That unless the defendants are enjoined, they will block, harass and prevent plaintiff in the transportation of said motion picture film and newsreels in Utah, to the detriment of plaintiff and the shipping public, and plaintiff has no other speedy or adequate remedy and will suffer irreparable injury unless defendants are enjoined from their threatened action.

(8) That this case arises under the Constitution and the laws of the United States in that Section 8 of Article I of said Constitution grants to the Congress of the United States the power to regulate commerce among the several states, and the Congress has delegated to the Interstate Commerce Commission power and authority to ascertain the nature of interstate commerce and the exclusive authority to regulate the same.

Wherefore, plaintiff demands judgment against the defendants, and each and all of them, as follows:

(1) That the Court make and enter a declaratory judgment adjudicating that the transportation of motion picture film and newsreels is interstate commerce.

[fol. 3] (2) That the defendants, and each and all of them, be forever enjoined and restrained from interfering with the transportation of motion picture film and newsreels in Utah by plaintiff over the routes as authorized by the Interstate Commerce Commission under docket No. MC89684 and all subs and amendments thereto.

(3) That plaintiff be awarded such other and further relief as may be deemed just and equitable.

(4) That plaintiff be awarded its costs and disbursements herein.

Harry D. Pugsley, Zar E. Hayes, Calvin L. Rampton, Plaintiff's Attorneys, 721 Continental Bank Building, Salt Lake City, Utah.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed November 3, 1950

Comes now the defendants herein and for answer to plaintiff's complaint herein, allege and state:

Defendants admit the allegations stated in paragraphs one (1), two (2), and three (3) of the complaint except that part of paragraph three (3) alleging that the transportation of motion picture films (except newsreels) between Salt Lake City, Utah, and points in Utah is in pursuance of any Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission, which part is specifically denied.

Defendants admit the allegations of paragraphs four (4) and five (5) of said complaint except the parts of said paragraphs alleging or inferring that the the transportation of motion picture film (except newsreels) by plaintiff between points in and within the State of Utah is interstate in character, or that the Public Service Commission of Utah has by issuance of an "Interstate License" thereby declared that said transportation of motion picture film within the State of Utah or wholly between points in the State of Utah [fol. 4] is in interstate commerce or interstate in character, or that the Interstate Commerce Commission has by any

of its orders or otherwise declared such transportation to be interstate in character, which parts are specifically denied.

Defendants admit the allegations of paragraphs six (6), seven (7), and eight (8) except the parts alleging or inferring that defendants are interfering or attempting to interfere with the conduct of transportation in interstate commerce by the plaintiff, or that defendants are imposing or attempting to impose a burden upon such interstate commerce, or that defendants are blocking or preventing plaintiff from the conduct of transportation of motion picture film in interstate commerce, which parts are specifically denied.

Wherefore, defendants pray that the judgment demanded by the plaintiff be denied and that defendants be awarded their costs.

C. W. Ferguson, Attorney for Defendants, 314 State Capitol Building, Salt Lake City, Utah.

Receipt of a copy of the foregoing answer is acknowledged this 1st day of November, 1950.

Harry D. Pugsley, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

REQUEST FOR ADMISSION OF FACTS—Filed November 14, 1950

To: C. W. Ferguson, Attorney of Record for Defendants, 314 State Capitol Building, Salt Lake City, Utah:

Please take notice that the plaintiff hereby requests the defendants, and each of them, in pursuance of Rule 36, of the Federal Rules of Civil Procedure, to admit within ten days after service of these requests, for the purpose of the above-entitled action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts.

[fol. 5] 1. That motion picture news-reels have been designated by the Interstate Commerce Commission as being interstate in character.

2. That motion picture news-reels are customarily produced, processed, manufactured and packaged outside of

the State of Utah and shipped from such point or points into the State of Utah for the purpose of being exhibited in theaters in Utah, Idaho, Montana, Wyoming and parts of Nevada and Oregon.

3. That motion picture news-reels are customarily booked under an agreement whereby the theatres in Utah and other states contract in advance to receive and exhibit said news-reels, prior to *its* actual delivery into the State of Utah.

4. That the said news-reels are shipped directly to a branch office distributor of film in Salt Lake City, Utah, and then trans-shipped from that point to the various theatres within the State of Utah, Idaho, Wyoming, Montana, Nevada and Oregon to fulfill the advance booking dates.

5. That it is customary for exhibiting theatres to show not only a news-reel, but also motion picture film designated as a feature, a comedy and often other short features, all of which are distributed by different national film companies having branch offices at Salt Lake City, Utah.

6. That the film distributors all have principal offices in New York and California and maintain branch offices in various localities, one of which is Salt Lake City, Utah, and from said branch offices in Salt Lake City, Utah, they distribute motion picture news-reel, feature, and comedy film throughout all of Utah, Idaho and Nevada and parts of Wyoming, Montana and Oregon. Twelve such typical branch office distributors located at Salt Lake City, Utah, are:

Name	Address
Columbia Pictures Corp.	206 E. 1st South
Eagle Lion Classics	252 E. 1st South
Loew's Incorporated	123 So. 2nd East
Monogram Pictures, Inc.	254 E. 1st South
National Screen Service Corp.	212 E. 1st South
Paramount Film Distributing Corp.	270 E. 1st South
R. K. O. Radio Pictures, Inc.	204 E. 1st South
Republic Pictures Corp.	214 E. 1st South
[fol. 6] Twentieth Century-Fox Film Corp.	216 E. 1st South
United Artists Corporation	210 E. 1st South
Universal Film Exchange, Inc.	208 E. 1st South
Warner Bros. Pictures Distributing Corp.	200 E. 1st South

7. That said news-reels and other motion picture films are frequently shipped from one theatre to another theatre within the State of Utah without returning to the distributor's branch office in Salt Lake City, Utah.

8. That generally in conjunction with said shipments of news-reels within the State of Utah, the exhibiting theatre has accompanying such news-reel, a feature picture film and a comedy film for exhibiting at the same theatre as part of the same show.

9. That said motion picture film feature is customarily booked in advance of its arrival within the State of Utah under contract, whereby the said motion picture film will be exhibited in the various theatres upon receipt at the dates so scheduled, subject to approval of release dates by the New York office.

10. That said motion picture films are produced, processed, manufactured and packaged outside of the State of Utah and are shipped from such point to a branch office distributor within the State of Utah, under contracts with the exhibitor, all of which must be approved by the New York office.

11. That said ordinary motion picture film is customarily wound on metal reels similar in character and appearance to those used for news-reel film and all are shown on the same projectors and by use of the same physical equipment.

12. That, except for the size of the container wherein said reels are deposited for shipping, said feature and comedy motion picture film moves in substantially the same manner, package and appearance as do news-reels.

13. That it is the general custom of the motion picture exhibiting industry in Utah that the showing of a feature motion picture is accompanied by the showing of a news-reel.

14. That the showing of news-reel, a feature and comedy motion picture at a particular theatre in Utah customarily [fol. 7] starts and ends on the same date so that the time of arrival and departure of the news-reel and the other motion picture film to and from said theatre must be concurrent.

15. That it is customary for the carrier of motion picture film to transport news-reels and the feature and com-

edy motion picture reels for a particular theatre in one load and to deliver said film at the theatre and to pick up from the theatre similar packages containing news-reels, feature and comedy motion picture reels and either deliver said news-reel and other motion picture reels to another theatre or return the same to a branch office distributor at Salt Lake City, Utah.

16. That on frequent occasions, the news-reel and other motion picture reels will be booked for showing at places and points outside of the State of Utah following their showing at various theatres within the State of Utah.

17. That all of the film distributors do not sell the news-reels, features or comedy films, but only license the right of exhibition thereof and the film ownership remains in the national distributor and the film itself is returned to New York after all bookings have been fulfilled.

Dated this 13th day of November, 1950.

Harry D. Pugsley, Of Pugsley, Hayes & Rampton.

IN UNITED STATES DISTRICT COURT

REPLY TO REQUEST FOR ADMISSION OF FACTS—Filed November 22, 1950

To: Pugsley, Hayes and Rampton, Attorneys of Record for Plaintiff, Continental Bank Building, Salt Lake City, Utah:

Comes now the defendants herein, by counsel, in compliance with Rule 36 of Federal Rules of Civil Procedure, and files their Reply to Plaintiff's Request for Admission of Facts, as follows:

1. Reference is made to alleged fact No. one (1) on page one (1) of plaintiff's request. If plaintiff intended to state, "That the transportation of motion picture newsreels has [fol. 8] been designated by the Interstate Commerce Commission as being interstate 'in character'," then defendants will admit that the Interstate Commerce Commission has so held where the facts underlying said interstate transportation of news-reels are identical with the facts set forth

in the case decided by the Interstate Commerce Commission, known as Tramways, Inc., vs. Exhibitors Delivery Service, Inc. Otherwise, defendants will deny said No. one (1) alleged fact.

2. Reference is made to Nos. two (2) and three (3) alleged facts, page one (1) of plaintiff's request. They are admitted.

3. Reference is made to No. four (4) alleged fact, pages one (1) and two (2) of plaintiff's request. Defendants do not know, therefore, defendants neither admit nor deny this fact.

4. Reference is made to alleged facts Nos. five (5) and six (6), page two (2) of plaintiff's request. They are admitted.

5. Reference is made to alleged fact No. seven (7), page two (2) and three (3) of plaintiff's request. It is denied.

6. Reference is made to alleged fact No. eight (8), page two (2) of plaintiff's request. Defendants do not know, therefore, neither admit nor deny the alleged fact.

7. Reference is made to alleged fact No. nine (9), pages two (2) and (3) of plaintiff's request. It is denied.

8. Reference is made to alleged fact No. ten (10), page three (3) of plaintiff's request. Defendants admit "that motion picture films are produced, processed and manufactured outside the State of Utah for shipment to Utah." The remainder of the alleged factual statement is denied.

9. Reference is made to alleged facts Nos. eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), and sixteen (16), pages three (3) and four (4) of plaintiff's request. They are denied.

10. Reference is made to alleged fact No. seventeen (17), page four (4) of plaintiff's request. Defendants admit that film distributors do not sell newsreels, features, nor comedy films—only license the right to exhibit them and that the [fol. 9] ownership remains in the film distributors. Defendants deny remainder of said alleged factual statement.

Dated this 21st day of November, 1950.

C. W. Ferguson, Attorney for Defendants.

[Verification omitted.]

In United States District Court

Partial Transcript of Proceedings on Pretrial—Filed April 5, 1951

Appearances:

Mr. Harry D. Pugsley, Mr. Wayne C. Durham, Attorneys for Plaintiff. Mr. C. W. Ferguson, Attorney for Defendants. Mr. Rex J. Hanson, Attorney for Seamons and Hill. Mr. Wood R. Worsley, Attorney for Joseph J. Milne Truck Lines, Inc.

Colloquy Between Court and Counsel

Mr. Pugsley: I think those are the fundamental issues of law and fact.

There are a number of issues of fact that will probably be questioned.

The Court: *Lets* hear what they are.

Mr. Pugsley: I have listed several I believe that will come up for determination: Are the film contracts between residents of different States?

All these contracts by exhibitors we contend are contracts that are signed by them but approved by the companies in either New York or California, and are contracts relating to this film between residents of different States. I don't know whether they admit that.

Mr. Ferguson: I don't think that is a matter in issue. This is not a question of validity of contract between parties residing in different States. It is a question of the character of the transportation within the State of Utah.

Mr. Worsley: We wouldn't admit it. I am advised that is not the situation.

Mr. Hanson: Neither will we.

[fol. 10] The Court: All right. I wonder if that is going to be material at all.

Mr. Pugsley: We believe so. A number of decisions have come down—whether it is interstate in character—deal with the question of contracting between residents of different States.

The Court: Contracts between whom and whom? If a contract between the carrier and somebody, that is material, but if it is a contract between the motion picture exhibitors

and distributors to which the carrier is not a party, how could that be material?

Mr. Pugsley: Only that the film itself partakes of an interstate character; not necessarily this transportation issue but the film itself is still in the course of interstate movement by virtue of contract entered into between non-residents and residents of Utah.

Mr. Ferguson: I believe the evidence will show in the case the transportation contract itself which is concerned in the case is a transportation contract between the exhibitor living in Utah and the carrier Wycoff. There is a contract with regard to the picture itself which goes to the picture company, but as the contract itself will show it has little to do with the transportation contract, which is a separate matter. The evidence will show the exhibitors themselves state in their contract that the matter of transportation within the State of Utah shall be the responsibility of the local exhibitor and the carrier.

Mr. Durham: We contend the contract will show the distributor has the final say on how the transportation will be accomplished.

The Court: I wonder if that point isn't covered in the first issue I suggested here?

Mr. Ferguson: I think it covers them all.

The Court: Do you disagree?

Mr. Pugsley: No. The factual matters will have to be whipped out on the trial. If we could agree on some of them——

The Court: Try another one.

[fol. 11] Mr. Pugsley: The character of the films is such they are never sold or consumed within Utah but merely leased by non-residents for exhibition within the State.

The Court: Isn't any controversy about that, is there?

Mr. Durham: After they are used they are shipped back for salvage purposes.

Mr. Ferguson: We admit the contract is a licensing contract to show the film in Utah. I would not like to be bound by a statement that the contract is an interstate contract.

The Court: They will admit there is no sale of the films. I think that is the general practice. It is a licensing arrangement.

Mr. Hanson: The films are just the things shown upon them, the object upon them—like a News reel—is the important thing; the things shown on the film.

The Court: What the exhibitor gets is the privilege to *throwing* the shadow on the screen. Do you want to admit that is the nature of the thing?

Mr. Hanson: So far as we are concerned I think so.

The Court: All right.

Mr. Pugsley: The local distributing office in Utah is merely a branch office of the non-resident film company; is used for operating convenience in the State.

The Court: Is there any disagreement about that?

Mr. Ferguson: I do not disagree with it.

The Court: For the Public Service Commission you admit that?

Mr. Ferguson: Yes.

Mr. Hanson: I don't think we do.

The Court: You represent whom?

Mr. Hanson: Seamon Truck Line.

The Court: Do you admit it?

Mr. Worsley: The matter of stating it for the sole convenience—there are branch offices, that we would admit. [fol. 12] The Court: Sole convenience is a conclusion. May we agree that the admission is that the local film distributor's office is a branch office of the producer?

Mr. Ferguson: Yes.

The Court: Is that what you wanted?

Mr. Pugsley: Yes.

The Court: What else?

Mr. Pugsley: That the transportation of motion picture News reels has been designated by the Interstate Commerce Commission as being interstate in character.

Mr. Ferguson: We deny that.

Mr. Hanson: We deny that. May be a difference between News reels and motion picture film as such, the way they are prepared and transported. We deny News Reels as such are shipped—.

Mr. Worsley: In the last stipulation this distribution, according to Mr. Pugsley, was locally made by branches of the producers. I am not so sure that is correct. I think it is made by distributor companies apart from the producing company itself.

The Court: I think that is so. Don't you think so, Mr. Pugsley? Aren't these distributing corporations separate corporations from the producing corporation in the motion picture industry? When they talk about a branch office here, isn't that office a branch of the distributing corporation?

Mr. Pugsley: That is correct.

The Court: Rather than a branch of the producing corporation?

Mr. Pugsley: That is correct.

Mr. Worsley: May the stipulation be made subject to check?

Mr. Ferguson: That is standard.

The Court: It is a branch of the distributing corporation. The distributing corporation is national in scope over these local branch offices.

[fol. 13] Mr. Pugsley: That motion picture News reels and the motion picture film are both produced, processed, manufactured and packaged outside of the State of Utah.

The Court: Sometimes that is not true.

Mr. Worsley: We deny that.

The Court: Some of the motion pictures are made in Utah.

Mr. Pugsley: That is only partially so.

Mr. Durham: They are produced but not distributed. The distribution always takes place in California or New York.

The Court: Your request for admission includes production and distribution too.

Mr. Ferguson: The evidence with regard to the handling of the films themselves, the packaging and the processing for shipment, all of which takes place at Film Row, is going to figure in the decision prominently.

The Court: We cannot admit that I guess.

Mr. Pugsley: The motion picture News Reels and the motion picture film are customarily booked under an agreement whereby the theaters in Utah and other States involved contract in advance to receive and exhibit them prior to the actual delivery into the State of Utah.

Mr. Worsley: We don't admit that.

Mr. Pugsley: And customary for exhibiting theaters to show not only the News Reel but also motion picture film designated as Feature or Comedy or Short Features, all

of which are distributed by different national film companies having branch offices in Salt Lake City, Utah, to show not only News Reel, to show a Feature and something else.

Mr. Ferguson: We agree to that.

Mr. Hanson: We will too.

Mr. Worsley: This proposal goes a little further. They agree the theater will show News Reel, Feature and other Short Features.

The Court: That is all you mean, isn't it?

Mr. Worsley: It goes beyond that. We will stipulate to that extent, yes.

[fol. 14] Mr. Pugsley: That the film distributors have their principal offices outside the State of Utah and maintain branch offices in Salt Lake City, Utah—a branch office here.

The Court: That covers something we have already. Of course the distributing companies operate their principal offices outside the State of Utah. No disagreement about that, is there?

Mr. Pugsley: That the branch office so maintained in Salt Lake distributes the film not only in the State of Utah but also in parts of Wyoming, Montana, Oregon, Idaho and Nevada.

The Court: No disagreement about that?

Mr. Hanson: No.

The Court: That branch office distributes over the intermountain area here?

Mr. Worsley: I am a little handicapped here because of shortness of time. I think that is right; I am not sure it is correct as to all of the listed distributors.

The Court: You don't admit it then. The rest of them do. Go ahead.

Mr. Pugsley: That the News Reels and motion picture film are frequently shipped from one theater to another theater within the State of Utah without returning to the distributor's office in Salt Lake.

Mr. Ferguson: Occasionally, I will agree.

The Court: Have you changed the word to "occasionally?"

Mr. Pugsley: It is more than occasionally.

The Court: Go to the next one.

Mr. Pugsley: That ordinary motion picture film is cus-

tomarily wound on metal reels similar in *charactar* and appearance to those used for news-reel film and all are shown on the same projectors, and by use of the same physical equipment.

The Court: What difference does that make whether—

[fol. 15] Mr. Pugsley: This is our contention: the Interstate Commerce Commission has said that News Reels are interstate in character and an identical commodity, except it is a Feature instead of a News Reel, is film handled in the same manner, must be of the same character.

The Court: It doesn't make any difference to me what the Interstate Commerce Commission has ruled about either one of those things. We are going to determine right here whether either one of them is interstate in character.

Mr. Pugsley: I believe that is important to the assumption of jurisdiction of the Interstate Commerce Commission over the commodity to determine—.

The Court: I am not going to adopt the ruling of the Commerce Commission just because they ruled on it; not even going to take the ruling of the Commission as any evidence. I think it is immaterial what they have ruled. We are going to determine the character right here on the basis of the evidence and the law.

Mr. Pugsley: That the showing of News-reel, a feature and comedy motion pictures at a particular theater in Utah customarily starts and ends on the same date so that the time of arrival and departure of the news-reel and the other motion picture film to and from said theater must be concurrent.

That is 14.

Mr. Worsley: We deny.

Mr. Pugsley: 15. That it is customary for the carrier of motion picture film to transport news-reels and the feature and comedy motion picture reels for a particular theater in one load and to deliver said film at the theater and to pick up from the theater similar packages containing news-reel, feature and comedy motion picture reels and either deliver said news-reel and other motion picture reels to another theatre or return the same to a branch office distributor in Salt Lake.

Mr. Ferguson: Part of that we would admit.

The Court: If you cannot admit it all, go to the next one.

Mr. Pugsley: That on frequent occasions, the news-reel and other motion picture reels will be booked for showing at [fol. 16] places and points outside of the State of Utah immediately following their showing at various theatres within the State of Utah.

Mr. Ferguson: We deny it.

Mr. Pugsley: That all of the film distributors do not sell the news reels, features or comedy films but only license—.

The Court: That is repetition.

Mr. Pugsley: One further item in it. And the film itself is returned to New York after all bookings have been fulfilled.

Mr. Ferguson: That we will deny.

Mr. Pugsley: Those are the factual matters we thought could be admitted.

One further thing; the certificates of public convenience and necessity held by the Wycoff Company are available and copies have been given to counsel. You indicated that wasn't of great concern to you. We tender such as an exhibit.

Mr. Ferguson: No objection.

The Court: Have the reporter mark the exhibit as a pretrial exhibit.

(Exhibit 1 on pretrial marked by the reporter.)

Mr. Worsley: In view of the fact Mr. Pugsley has covered the requests for admission, is there any sense in attempting to answer them now?

The Court: Do you request them to answer your requests for admission?

Mr. Pugsley: No, there is no further need for that in our opinion.

The Court: You decline, Mr. Worsley, to admit some of those matters which the Public Service Commission and other trucklines admitted. Maybe after this session you can get together and find out what information you seek and where other counsel have made the admissions you can too. It would be too bad to go to trial on an issue that you only deny when it is admitted by the others.

Mr. Worsley: I will endeavor to do so.

[fol. 17] Reporter's Certificate (omitted in printing)

IN UNITED STATES DISTRICT COURT

PRETRIAL ORDER—Filed January 22, 1951

This cause coming on for pretrial on the 12th day of January, 1951, Mr. Harry D. Pugsley and Mr. Wayne C. Durham appearing for the plaintiffs, and Mr. C. W. Ferguson appearing for the Public Service Commission of Utah, defendant, and Mr. Rex J. Hanson appearing for intervenors Seamons and Hill, and Mr. Wood R. Worsley appearing for intervenor Joseph J. Milne Truck Line, Inc.

Now therefore, upon the statements of counsel for the respective parties, as to the issues of law and fact to be tried, the following summary of said issues is hereby made and ordered filed herein, to-wit:

(1) Whether or not as a matter of fact the carriage involved herein is interstate commerce.

(2) The issue of law as to whether the character of the transportation as determined constitutes interstate commerce.

Willis W. Ritter, United States District Judge.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed March 7, 1951

This matter coming on regularly for hearing before the Court, without a jury, on the 30th day of January, 1951, and the plaintiff, Wycoff Company, Incorporated, appearing by its president, M. S. Wycoff and its attorneys, Harry D. Pugsley, of the firm of Pugsley, Hayes and Rampton, and Wayne Durham; and the defendants, Public Service Com- [fol. 18] mission of Utah, Hal S. Bennett, Donald Hacking and W. R. McEntire, members, appearing by their attorney, C. W. Ferguson; and intervenor Melva Seamons and Roy Hill, dba Seamons Truck Line, appearing in person and by their attorney, Rex J. Hanson of the firm of Stewart, Cannon, Hanson and Baldwin; and intervenor Joseph J. Milne Truck Line, Inc., a corporation, appearing by its president, Joseph J. Milne, and by its attorney, Wood R.

Worsley of the firm of Skeen, Thurman and Worsley; and the Court having heard the evidence introduced in behalf of plaintiff, defendants and intervenors, and being fully advised in the premises, and the matter having been submitted, and the Court having heard and considered arguments of counsel, now makes and enters the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That the plaintiff, Wycoff Company, Incorporated, is a Utah corporation engaged in the transportation of property, to-wit: motion picture film, as a motor common carrier, for hire, over and upon public highways of the State of Utah as well as highways of other surrounding states; that defendants, Hal S. Bennett, Donald Hacking and W. R. McEntire are members of the Public Service Commission of Utah, a public corporation of the State of Utah, organized and existing under and by virtue of statutes of the State of Utah for the purpose of regulating public utilities within the State of Utah and among them motor common carriers, for hire, upon public highways of the State; that Melva Seamons and Roy Hill, dba Seamons Truck Line, and Joseph J. Milne Truck Line, Inc., a Utah corporation, intervenors herein, are engaged in the transportation of property, to-wit: motion picture film, as motor common carriers, for hire, over and upon the public highways of the State of Utah.

2. That motion picture films are distributed by national film organizations throughout the State of Utah, as well as throughout Idaho, Nevada and parts of Wyoming, Montana and Oregon by branch distribution offices located in Salt Lake City, Utah, named as follows:

Name	Address
Columbia Pictures Corp.	206 E. 1st South
Eagle Lion Classics	252 E. 1st South
[fol. 19] Loew's Incorporated	123 So. 2nd East
Monogram Pictures Inc.	254 E. 1st South
National Screen Service Corp.	212 E. 1st South
Paramount Film Distributing Corp.	270 E. 1st South

Name	Address
R K O Radio Pictures Inc.	204 E. 1st South
Republic Pictures Corp.	214 E. 1st South
Twentieth Century-Fox Film Corp.	216 E. 1st South
United Artists Corporation	210 E. 1st South
Universal Film Exchange Inc.	208 E. 1st South
Warner Bros. Pictures Distributing Corp.	200 E. 1st South

3. That as a matter of general practice, each shipment of motion picture film transported into the State of Utah and delivered to branch distribution offices aforesaid, is packaged in a paper board carton or box, each said shipment containing various numbers of thousand-foot rolls of film, which rolls are not wound upon metal reels nor otherwise ready for exhibition at theaters; that upon receipt of such a shipment or shipments of film at the Salt Lake City, Utah distributing offices, each roll of film (or original prints as they are sometimes called) is reeled through an inspection machine to check its condition upon its arrival, and determine whether or not it has been damaged during its transportation from laboratories and points outside the State of Utah to Salt Lake City, Utah; that thereafter these rolls of film are wound upon metal reels—2,000 feet of film to each reel—and to each reel of film there is affixed what is known to the trade as "heads and tails" to enable the proper use of the film in projection machines at exhibiting theatres; that thereafter said reels of film are placed in protective metal shipping containers and stored in fireproof vaults within said branch distribution offices in Salt Lake City to await the booking of the exhibition of these films at exhibitor theaters throughout the State of Utah as well as in other states heretofore mentioned.

4. That the inspection of motion picture film upon its arrival at branch distribution offices in Salt Lake City within the State of Utah, as well as the winding of the film upon metal reels, the attachment of "heads and tails" to each reel of film and the placing of the film in protective metal shipping containers are all necessary steps in the proper handling of motion picture film upon and after [fol. 20] arrival at branch distribution offices at Salt Lake

City, Utah, from points outside the State of Utah; that all such steps in the handling of film are necessary before the film may be reshipped within the state of Utah to exhibitor theaters in Utah for the showing of the film in these theaters.

5. That the film distributing companies do not sell any of the motion picture films to the exhibiting theaters but grant a limited licensed under the respective copyrights of the motion pictures. The licensing contracts for the exhibition of motion picture films at theaters throughout Utah are entered into between such theaters and branch distribution offices subject to approval by their respective home offices outside the State of Utah, that nevertheless under the terms of said uniform contracts none of said distributors are bound to deliver any certain motion picture film (feature, short subject, comedy, western or serial) to any certain exhibitor theater in any certain city, town or place in the State of Utah on any certain dates for exhibition thereof; that the exact dates of exhibition of films at theaters throughout Utah are not booked and agreed upon between exhibitor theaters and branch distribution offices until after said films are physically available in Utah for distribution, that is, checked, inspected, rewound, prepared and placed in protective, metal shipping containers, in vaults, within branch distributing offices in Salt Lake City, Utah.

6. That all motion picture films are developed and printed at laboratories outside the State of Utah, and transported into the State under transportation contracts with carriers, wherein film distributing organizations outside the State of Utah are the consignors and their respective branch distributing offices within the State of Utah are the consignees, and they pay the transportation charges as well as control the selection of the carrier and the routing of the shipments. However, after the films have been inspected, wound upon metal reels, prepared for projection machines and placed in protective metal shipping containers they are delivered F. O. B. at branch distributing offices in Salt Lake City, Utah, to carriers designated by theater consignees, and transported between said branch distributing offices and theaters throughout Utah, as well as between such theaters, and returned to branch distributing offices all under new

and different transportation contracts made between car-
[fol. 21] riers and local Utah theater exhibitors; that said Utah theater exhibitors are responsible for and pay all transportation charges; that motion picture films are rarely transported directly from points outside the State of Utah to exhibitor theaters in the State of Utah for showings; that the only exceptions to the general practice of handling motion picture films as detailed in these findings are the instances of weekly shipments of newsreels featured at a limited number of first-run theaters in Utah and other states, and the occasionally borrowed and directly shipped feature film to met play date emergencies, all of which films thereafter take their places in the regular distribution channels according to routine booking procedure as heretofore covered in the foregoing findings.

From the foregoing Findings of Fact, the Court now makes and enters the following

Conclusions of Law

1. That the defendants and intervenors are entitled to a decree of this Court finding that the transportation of motion picture film by carriers from the branch distribution offices of film companies in Salt Lake City, Utah, to theater exhibitors throughout the State of Utah, and the transportation of film between theaters within the State of Utah, and the return of the film to the branch distributing offices, are transportation operations in intrastate commerce, and subject to regulation by the State of Utah under applicable laws and statutes of said State, and the Public Service Commission of Utah; that the Public Service Commission of Utah, and the defendant members thereof, have not and are not interfering with the conduct of interstate commerce, nor have they imposed upon such interstate commerce any undue burden.

2. That the defendants and intervenors are entitled to a decree of this Court, denying plaintiff's petition for an order enjoining and restraining the Public Service Commission of Utah from interfering with transportation of motion picture film and newsreels by plaintiff over routes as authorized by the Interstate Commerce Commission.

Dated March 7th, 1951.

Willis W. Ritter, Judge.

[fol. 22] Received copy this 7th day of March, 1951.
Wayne C. Durham, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

DECREE—Filed March 7, 1951

This matter coming on regularly for hearing before the Court, without a jury, on the 30th day of January, 1951, and the plaintiff, Wycoff Company, Incorporated, appearing by its president, M. S. Wycoff and its attorneys, Harry D. Pugsley, of the firm of Pugsley, Hayes and Rampton, and Wayne Durham; and the defendants, Public Service Commission of Utah, Hal S. Bennett, Donald Hacking and W. R. McEntire, members, appearing by their attorney, C. W. Ferguson; and intervenor Melva Seamons and Roy Hill, dba Seamons Truck Line, appearing in person and by their attorney, Rex J. Hanson of the firm of Stewart, Cannon, Hanson and Baldwin; and intervenor Joseph J. Milne Truck Line, Inc., a corporation, appearing by its president, Joseph J. Milne, and by its attorney, Wood R. Worsley of the firm of Skeen, Thurman and Worsley; and the Court having heard the evidence introduced in behalf of plaintiff, defendants and intervenors, and being fully advised in the premises, and the matter having been submitted, and the Court having heard and considered arguments of counsel, and having made and entered Findings of Fact and Conclusions of Law:

It is hereby ordered and decreed:

1. That the transportation of motion picture film by carrier from the branch distribution offices of film companies located in Salt Lake City, Utah, to theater exhibitors throughout the State of Utah, and the transportation of film between theaters within the State of Utah, and the film returns thereof, are transportation operations in intrastate commerce and subject to regulation by the State of Utah under applicable laws and statutes of said State, and the Public Service Commission of Utah, and that the Public Service Commission of Utah, and Hal S. Bennett, Donald

Hacking, and W. R. McEntire, members of said Commission, have not and are not interfering with the conduct of [fol. 23] interstate commerce, nor have they imposed upon such interstate commerce any undue burden.

2. That the petition of plaintiff, Wycoff Company, Incorporated, a corporation, for an order enjoining and restraining said Public Service Commission of Utah from interfering with transportation of motion picture film and newsreels by plaintiff over routes as authorized by the Interstate Commerce Commission be, and the same is hereby, denied.

Dated March 7, 1951.

Willis W. Ritter, Judge.

Received a copy of the foregoing this 6th day of February, 1951,

Wayne C. Durham, Harry D. Pugsley (L. P.), Attorneys for Plaintiff.

Clerk's Note

Notation of entry of Decree made on docket sheet March 7, 1951, in accordance with Rule 79 of Rules of Civil Procedure.

Direction to Enter Judgment

To the Clerk: Enter judgment in the above-entitled case.

Willis W. Ritter, U. S. District Judge.

Dated January 31, 1951.

Filed January 31, 1951.

In United States District Court

Notice of Appeal—Filed April 6, 1951

Notice is hereby given that Wycoff Company, Incorporated, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit, from the Decree dated March 7, 1951.

[fol. 24] Wayne C. Durham, Elias D. Rees, Attorneys for Plaintiff.

Undertaking for Costs on Appeal filed in the United States District Court, April 6, 1951, for the sum of Two Hundred Fifty Dollars ($250.00) is signed by the United States Fidelity and Guaranty Company.

In United States District Court

Order—Filed May 16, 1951

Good cause appearing, it is ordered that appellant have to and including the 1st of June, 1951, in which to file the record on appeal in the above-entitled case with the Clerk of the United States Court of Appeals for the Tenth Circuit.

Willis W. Ritter, Judge.

In United States District Court

Order—Filed May 29, 1951

Good cause appearing, it is ordered that appellant have to and including the 21st of June, 1951, in which to file the record on appeal *appeal* in the above-entitled case with the Clerk of the United States Court of Appeals for the Tenth Circuit.

Willis W. Ritter, Judge.

In United States District Court

Statement of Points Relied Upon—Filed April 18, 1951

Comes now the plaintiff and sets forth the following points which it intends to rely upon in its appeal in the above-entitled matter:

1. That the Court committed error in law in excluding certain evidence tendered by plaintiff which would have proved that the out-of-state home offices of the local film [fol. 25] distributors exert a continuing control over the transportation of motion picture film within the State of Utah, which would have indicated that said transportation was interstate and not intrastate in character.

2. That the Court committed error in law by its decree which held that all the transportation of every type of motion picture film, namely, feature, short subject, comedy, western, serial and newsreel motion picture film, within the State of Utah, is in intrastate and not in interstate commerce.

Dated this 18th day of April, 1951.

Wayne C. Durham, Elias D. Rees, Attorneys for Plaintiff and Appellant.

IN UNITED STATES DISTRICT COURT

Transcript of Testimony and Proceedings

APPEARANCES:

Mr. Harry D. Pugsley, Mr. Wayne C. Durham, Attorneys for Plaintiff; Mr. C. W. Ferguson, Attorney for Public Service Commission of Utah; Mr. Rex J. Hanson, Attorney for Seamons and Hill; Mr. Wood R. Worsley, Attorney for Joseph J. Milne Truck Lines, Inc.

Reported by: E. M. Garnett and F. W. Otterstrom.

The Court: All right, gentlemen.

COLLOQUY

Mr. Ferguson: Before the case starts, I believe we might be able to confine the issues within a little narrower limits. I would like to present and make that proposal. I could serve counsel with the suggested copy. The pretrial order sets out No. 1: Whether or not as a matter of fact the carriage involved herein is interstate commerce. I have made the suggestion in this copy: Whether or not as a matter of fact the transportation of motion picture film and motion picture advertising matter wholly within points and places within the State of Utah is intrastate or interstate in character.

This may seem obvious that all transportation going across State——

[fol. 26] The Court: Don't argue it now. I think I will

state it more broadly than it is in the pretrial order: Whether or not—

The only carriage involved is motion picture film and motion picture advertising matter—that is all we are talking about; the evidence will disclose, I suppose, what the transportation is.

Can we stipulate to that, that this is a transportation of motion picture film and motion picture advertising matter wholly between points and places within the State of Utah?

Mr. Pugsley: No; we prefer to have the issues as stated in the pretrial order.

The Court: The proposed amendment will be denied then. We will proceed on the order as drawn.

Mr. Worsley: At the time of the pretrial hearing intervenor Joseph J. Milne had not gone to the full extent of factual stipulation with the Public Service Commission. You asked us to check up and be prepared to stipulate further, and in view of that with regard to the issue this morning that we have checked we stipulate our admission of facts to the same extent as the intervenor Seamons and the Public Service Commission.

I would also like to file the answer which conforms essentially to the other answers and which is in harmony with them.

The Court: Very well, it may be filed. Proceed with your evidence.

Mr. Pugsley: We would like to state the matter involved just briefly.

The Court: Is there anything other than you have stated to me two or three times?

Mr. Pugsley: We believe the issues stated in pretrial are sufficient. I will call Mr. Wade as our first witness.

The Court: You represent Wycoff Company, is that right?

Mr. Pugsley: Mr. Durham and I represent Wycoff Company, the plaintiff.

[fol. 27] CHARLES R. WADE was thereupon called as a witness by the plaintiff, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Pugsley:

Q. Mr. Wade will you state your full name?
A. Charles R. Wade.
Q. What is the nature of your occupation?
A. I am branch manager of Universal International Film Exchange.
Q. Where is your place of business?
A. 208 East First South.
Q. You state you are branch manager. Where is the principal office and place of business of that company?
A. In New York.
Q. How long have you been engaged as branch manager?
A. Thirteen years.
Q. Has that been exclusively here in Salt Lake?
A. Yes.

Mr. Pugsley: Is this the International Film Exchange?

A. Universal.
Q. Will you state briefly what your requirements are as manager of the Exchange?
A. Sale of our pictures and solely distribution of our pictures in this area here which is composed of Utah, Idaho, Montana, and part of Nevada and part of Wyoming.
Q. I believe you said sale of your pictures; what is the nature of the so-called sale?
A. Through a form of contract or licensing of our pictures to play.

The Court: I don't suppose there is any doubt about that. No dispute about the nature. Isn't that part of your stipulation?

The Witness: It is a license.

The Court: There is a stipulation covering that.

Q. Would you state the type of film handled by your Exchange?

A. We handle what we call Feature Product, or pictures as the ordinary public would classify them, We call it Feature Product. We handle short subjects product and News reels.

Q. Do you handle film for the Armed Services?

A. Yes, we do; we handle for the Army Posts or camps and the Veterans' Administration.

[fol. 28] Q. Will you state the method by which this film is received at your Exchange here and what happens to it next?

A. The film is shipped in what we call a type of raw stock; it is shipped in here in containers, and then from that point on we have to mount the film on reels, what we call mounting on reels, put the film on a reel. It is broken down into a thousand feet on one container; then we have to splice them or put them together in a two-thousand foot reel. The News reels and some of the Short Subjects are handled in the same manner, only on a smaller reel, a thousand-foot reel.

Q. Those reels are the units sent out to the exhibitors, is that correct?

A. That is right.

Q. Do you maintain a record of the prospective showing places for your film in the territory?

A. You mean in the theaters?

Q. Yes.

A. Yes, we do.

Q. Do you have a department that handles listing and dating of those showings?

A. Yes.

Q. What do you call that department?

A. Booking Department.

Q. What is done by that department so far as their relationship to the Home Office, in informing the Home Office of your bookings?

A. All of the dates in one form or another are transmitted by correspondence, by mail, back to the New York office, and they in turn, from the information we give them on the play dates here go through their records back there—is applied to their records back there.

Q. Do you have a form of contract that you enter into with exhibitors?

A. Yes, we do.

Q. State if you change the method of making those contracts.

A. We maintain what we call Sales Representatives that cover the territory that I mentioned awhile ago, and they contact the individual theaters and theater managers for the sale, or for the licensing of our pictures; in turn they write up a contract; the contract is submitted to me and in turn is submitted to the Home Office for final approval. By the Home Office I mean to say the New York office.

Q. Is that the invariable rule? You are restricted to that rule in the handling of these contracts?

A. Every subject.

Q. Will you state whether or not there is a different, new type of contract as to Features as distinguished from the [fol. 29] Short Subjects and News Reels?

A. There are separate contracts; we also have separate contracts on some pictures—when I say Features, our Short Subject contract provides for Short Subjects only; they are written up for the series of the Shorts we license; it could cover three or four different series of Shorts we produce, or it could be confined to maybe one series such as Cartoon series.

Q. Would you explain the series as to whether or not when you have made these contracts, whether all the films to be exhibited under the series are then in your possession.

A. No, they are not all in our possession at the time we make the sale because as the Short Subjects are released they are shipped in to us for distribution in this territory by the Laboratory.

Q. Is it true then that the contract for the exhibition of the Short Subjects is made prior to the actual shipment from the Laboratory to you?

A. Yes in most cases, the greater portion of the cases.

Q. State to his Honor the method of contract as to News Reels.

A. News Reel is covered by either one or two issues, what we call our weekly releases, one issue is released on a Saturday, the other one released on a Wednesday during that given week; that procedure just keeps on automatically during the period of a year.

In contracting for a News Reels we either contract for what we call two issues which is contained on 104 News Reels, or we contract for one issue of 52 issues, which would cover the full period of a year. The contract in itself is handled in the same manner as our Feature Product or our Short Subjects, all submitted to the Home Office or the New York office for final approval.

Q. Then is it true that the contract covers delivery of News Reel covering events that have not yet happened even?

A. That is right.

Q. The reels themselves and the film *hs* not yet been produced?

A. That is right. It may be in the same manner as a newspaper, if you subscribe for a newspaper in advance. It is the same thing with a New- Reel which is our newspaper of the screen.

Q. You have stated your method of contract as to the Feature pictures. How is that handled at the present time?

A. The contract on the Feature product is handled in the same manner; the majority of the contracts are written or [fol. 30] licensed by either myself or a representative that we have in the territory some time prior to the time we have our prints in this office for distribution. The contract in itself is submitted by the sales representatives to me and I in turn submit those to New York for their final approval.

Q. When you say for approval, I will ask you whether or not that approval is an acceptance for approval?

A. It is an acceptance or a rejection either, by one of the officials of our company in New York. All contracts are not accepted because of maybe the terms.

Q. Are copies of these contracts retained in the New York office?

A. Yes sir.

Q. Are copies after acceptance sent to your office?

A. Yes. If the contracts are approved they send me two copies back, one for our file and one that we in turn send to the exhibitor with a letter advising him of the approval of that individual contract or picture.

Q. In what territory do you distribute these three types of film?

A. In Utah, part of Nevada, part of Wyoming, Idaho, a small portion of Oregon, and Montana.

Q. Do you know in advance of receipt of the film exactly in what State these films will be delivered?

A. In advance you mean?

Q. Yes.

A. No, I don't.

Q. And do you have a method that you follow in delivery from one theater to another theater?

A. Yes, we do. In most cases we try to circuit the print; because of our area the towns are so far apart we try to circuit the print from one town to another to save some time, which is a considerable amount of money as far as our distribution here is concerned.

Q. When you refer to circuiting, do you define that as relative to the return of the film to the Exchange?

A. I mean by that if the print of a picture, an individual picture, or even a Short Subject, if it happens to be in Idaho for instance and we want to send it to another point in Idaho that would be close by, rather than to bring that print back into our Exchange here in Salt Lake and then send it back out again—we lose considerable time—and in all cases where we can circuit a print from one town to another like that, we do it because of the amount of money and the time involved.

Q. I ask you whether or not in the course of ordinary [fol. 31] booking sometimes this circuiting is wholly within one State?

A. No, it is not always within one State; we might circuit a print from Idaho into Montana.

Q. Also you have occasion to circuit from one theater to another theater within the same State?

A. That is right many times.

Q. Does your company have another Exchange in the West?

A. Yes, we have what we call a shipping branch in Butte; that is supervised by myself out of Salt Lake. We have an Exchange in Los Angeles, one in San Francisco, Portland, Seattle, one in Denver.

Q. Have you worked in any other Exchange besides the Salt Lake Exchange?

A. Yes, I have.

Q. I ask you whether or not the procedure in handling

film and the distribution is uniformly directed by the company in all Exchanges?

Mr. Hanson: We object to that. He can testify about his own company.

The Court: If he has any knowledge. Do you have any personal knowledge what the practice is outside of this district?

A. Yes, I do.

The Court: You may testify. That is personal knowledge, is it?

A. Yes.

By Mr. Pugsley:

Q. Based on your personal knowledge and experience in your company's operations, state whether or not the other Exchanges handle the distribution of film the same as you handle it?

A. Just about the same.

Q. I ask you whether or not your company publishes a Manual of Directions that is sent to each Exchange?

A. Yes, they do. We have a national system and each of our branches are provided with this Manual. Our system is carried out the same in all branches, with the exception of maybe local—a few little local conditions that might deviate off the line a little bit.

Q. After a film has been shown in the various theaters with whom you have contracted, what is done with the film?

A. It is one of two things, either circuited by that theater to another theater, or if we have no booking set up on that [fol. 32] particular print it is either returned to our Exchange in Butte or in Salt Lake.

Q. Do you have occasion to send prints of a film from your Exchange area to another Exchange area of the Universal?

A. Yes, we do; there is occasions where a booking or date of a picture might be submitted to us for one of our towns in our territory and we don't have a print available, and I can cite a specific case of that; in handling a town like Couer d'Alene, Idaho, where it is way up in the Northwest, we would ask our Seattle branch to fill that date for us if

they possibly could, and in that case we probably would not even see the print ourselves or have any physical handling of it; it would be shipped out of the Seattle branch and right back to Seattle when the theater finished the picture.

Q. I ask you whether or not the New York office exercises any degree of control over your method of handling the film?

A. They do; when we make such a request as asking for what we term a loan print or borrowed print, our requests are made through our New York office for an additional print covering a booking.

Q. Do you advise the New York office as to all shipments made from the agency?

A. Yes; they daily receive a copy of our shipping sheet prepared here in Salt Lake, and in turn they record their records back there from the sheet.

Q. Does the New York office have authority, and do they on occasions, withdraw prints from your ordinary bookings?

A. They do.

Q. What happens to the film after all your bookings have been fulfilled and the film has been liquidated—and what is liquidation of a film?

The Court: You won't need to answer that question.

By Mr. Pugsley:

Q. What happens to the film?

A. After we have completed our bookings here then the film is dismantled, or we call it "junking," and in that case we prepare a junking list and submit to New York showing the condition of the individual print, and they in turn advise us their approval of junking these prints; then we dismount the print again, we take the film off the reels and we pack it in these big steel barrels and ship it back to the laboratory.

Q. Do you junk or physically destroy your film here in Utah?

A. No, we do not.

[fol. 33] Q. Accompanying film from time to time there is certain advertising material, is there not?

A. Yes.

Q. Do you handle the distribution of advertising material?

A. No, we do not.

Q. What company or agency does that?

A. The National Screen Service handles our advertising.

Q. Who prepares it for the National Screen Service?

A. That I am not too familiar with, just how it is handled, but our studio I know prepares the campaigns from that; who actually prints it I am not familiar with, whether the National Screen or ourselves.

Q. Do you know whether or not that is prepared and printed in Utah?

A. No, it is not.

Q. In making your prints for the exhibition of films, is that on a fixed fee or a percentage basis?

Mr. Hanson: Just a moment. The contracts themselves are the best evidence.

The Court: I think that is correct. Objection sustained.

Mr. Pugsley: We would like to pursue the matter in this respect, to show the custom——.

The Court: The custom is immaterial. *Lets* see what the contract says.

By Mr. Pugsley:

Q. Do you have any of the contracts with you at the present time?

A. No, I don't.

Mr. Pugsley: We would like to make a tender of proof, if we may, of the custom within the trade of handling; part of the contracting, on Features, on a percentage basis and part on a fixed fee basis.

The Court: What difference does that make in this State?

Mr. Pugsley: We believe it shows a further continued interest of the ownership and control and management of the film.

The Court: The management and control by whom?

Mr. Pugsley: By the New York office and the owners of the film and the copyright owner.

Mr. Ferguson: They have special contracts covering these special transactions.

[fol. 34] Mr. Hanson: The contracts themselves are the important things. We object to testimony on the contracts being gone into. When he is talking about what is in the contracts we would like to see them here.

The Court: Objection will be sustained. He may make whatever tender he wants.

Mr. Pugsley: We make that tender.

Q. Who determines the number of prints of a particular film to be sent into this area for distribution by you?

The Court: I am wondering what is the importance of this material—all of it. What difference does it make whether New York or Hollywood determines how many prints are made? What effect will that have on the nature of this transportation? That is the only thing in issue.

Mr. Pugsley: The issue is whether it is interstate commerce in character.

The Court: What bearing does evidence showing how many prints, who determines how many prints, have upon that?

Mr. Pugsley: We believe it is germane in this: it shows the continued control and continued intention of retaining interstate character.

The Court: The prints are made long before any control; as a matter of fact the motion picture producer determines how many prints he makes. I don't see how that determination one way or the other would have any bearing upon the nature of the carriage of advertising matter in Utah.

Mr. Pugsley: We think the actual fact is not the producer but often a distributor has a great deal to say about the number of prints to be produced and distributed.

The Court: It is like any other product being manufactured by a producer; he goes around the trade to find out how much market he is likely to have. Is that what you have in mind?

Mr. Pugsley: We want to show that determination is not made by the local branch.

[fol. 35] The Court: That doesn't have anything to do with transportation.

Mr. Pugsley: Our theory is it does, but we will submit it.

The Court: Well, go ahead.

By Mr. Pugsley:

Q. Who does make the determination as to the number of prints to be sent into an area?

A. That is arrived at by our past experience.

The Court: I am not going to permit you to go into all that monkey business—we will be here until July if we fool around with that. *Lets* get down to the nature of the transportation in Utah; that is what we are interested in.

By Mr. Pugsley:

Q. Mr. Wade, I direct your attention to the films that are exhibited to the armed forces in your area. Will you tell how the delivery of those is handled?

A. Yes. The Army and the Veterans Administration, particularly the Army, have set up what they term a B circuit and an A circuit, and the pictures are determined in New York by an Army representative back there; as these pictures are released he determines back there whether the picture is going to be booked, the individual picture is going to be booked in an A or B circuit that has been established, we having been notified to that effect; then as the pictures come along and are released, we are notified by our home office that the Army will book this picture on the A circuit in a given period——.

The Court: I do not see any relevancy to that.

Mr. Pugsley: We request him to state the places to which delivery——

The Court: Let's cut out these long-winded explanations preliminarily and get down to what happens in Utah; get down to what happens here. That is what we are litigating.

By Mr. Pugsley:

Q. To what points do you deliver film for the Armed Services?

A. The prints are shipped out of here; we serve Fort Douglas and we serve Fort Harrison, Montana, Great Falls Air Base and Boise Air Base and Hill Field and Clearfield.

Q. Do you have any Veterans Administration points that you also serve?

A. We serve the Veterans in Boise and in Harrison, Montana.

[fol. 36] The Court: Seems to me immaterial whether they serve outside of the State. The important thing is what goes on in Utah because we are concerned with the nature of the transportation wholly within points within the State of Utah. Confine your interrogatories to within the State points. Let's get this down to what we are litigating.

By Mr. Pugsley:

Q. Directing your attention to the points within the State of Utah of these Army circuits——

The Court: He has given you that, Fort Douglas, Clearfield, Hill Field.

By Mr. Pugsley:

Q. I would like to ask you how the delivery is handled as to those points of the films.

Mr. Hanson: Are you talking about the Government theaters now?

Mr. Pugsley: We are.

A. The Armed Services pick up most of these prints themselves.

The Court: So there is no carriage by a public carrier?

By Mr. Pugsley:

Q. Is that true in every instance, Mr. Wade?

A. I mean that is confined to being local—where close enough to pick it up; that does not apply to out of the State, no.

Q. We are asking just about points within the State.

The Court: That is not involved here; that is not a public carrier.

Mr. Pugsley: I wasn't aware of that, your Honor.

The Court: Have you taken this man's deposition?

Mr. Pugsley: No, I haven't. I talked with him yesterday in seeking information as to the method of carriage. I wasn't advised on that phase.

The Court: He is your witness; I assume you know what he is to talk about.

Mr. Pugsley: Not quite all.

Q. Will you state the method of handling delivery of film within the State of Utah from your Exchange to points within the State of Utah, how was that handled?

[fol. 37] A. Some of the prints are shipped direct to the theater, and some are shipped to play from one theater to the other, or one point to another; then they come back into the Exchange.

The Court: When you say "shipped"—find out what he means by that.

By Mr. Pugsley:

Q. What is the means of carriage you use, what transportation facilities do you use in moving the films within Utah?

A. Some by truck-line, some by *Parcels* Post, others by express.

Q. Who directs the points to which this film is to be shipped?

A. That is governed by the booking we receive from the individual theater.

Q. Is the point of delivery directed by you or by the individual theater?

A. The point of delivery?

Q. Yes.

The Court: It is delivered to the theater?

Mr. Pugsley: The practice of theaters circuiting I want to come before the court now.

A. The point of delivery? It is either by arrangement that the theater man makes with an individual truckline, or he might request we ship it by *Parcels* Post; might be an inland point where he has no means of transportation other than Parcels Post, or if there is no arrangement made at all we automatically ship the print express.

Q. Who makes up the billings to be handed to the truck-line or express company?

A. The billing for shipment?

Q. Yes.

A. The shipping clerk.

Q. That is the shipping clerk in your office, or whose office?

A. In our office.

Q. Is that true as to the movement of film from one theater to another theater within Utah?

A. No; in that case the print wouldn't come back into the Exchange. Say the circuit is set up from one town to another, by arrangement with the theater that is now playing the film or going to play it, he is notified after his use the print is to be shipped to this other point or other theater.

Q. Who prescribes that circuit?

A. We do.

Q. Is that in conformance with the rules and regulations set up by the New York office, or determined by you alone?

A. It is a standard ruling by our company; always has been.

[fol. 38] Q. Who directs the shipment after the film has been liquidated?

A. We do.

Mr. Hanson: We object to that as immaterial.

The Court: Sustained.

Q. Do you know whether or not the same procedure is followed as to points within the State of Utah in the movement of the advertising material?

A. That I cannot answer.

Q. Is the method of movement of film within the State of Utah the same for News Reels as it is for the Features and Shorts?

A. That movement is the same, yes; it is more so on the News Reels; it is circuited from one theater to another without returning as often to the Exchange.

Q. Is it customary for a theater to receive not only a Feature film but also some Short Subject film accompanying it?

A. Yes.

Q. What percentage of the theaters in the State of Utah receive in addition to a Feature picture, a Short Subject picture?

Mr. Worsley: Do you mean for one showing?

Q. For each week or each time showing?

A. I don't know whether I could answer that properly or not. It is not true in all cases because they might get the Feature picture from us and the Short Subject from some one else. That I wouldn't know.

Q. What percentage of the theaters in Utah exhibit at the same showing not only a Feature but also a News Reel, if you know?

A. I would say maybe less than 50 per cent.

Q. What percentage of the theaters in Utah, if you know, do you license Short Subject film to?

A. How many?

Q. What percentage of the theaters in Utah?

A. I would say 75 per cent.

Q. Do you know how many theaters there are within the State of Utah exhibiting film?

A. I am not sure because I haven't checked recently. I would say about 150.

Mr. Pugsley: That is all. You may inquire.

Cross-examination.

By Mr. Ferguson:

Q. Mr. Wade, in your branch at Salt Lake City do you have a portion of it that is used entirely for the checking of [fol. 39] films and for the storage of film?

A. You mean inspecting?

Q. Yes.

A. Yes, we do.

Q. When film is shipped in here from outside the State, will you describe more minutely to the Court just the condition in which this film is received in that shipment?

A. That could vary, but we don't know the condition of the individual print until we actually have checked it, gone through the physical operation of checking it.

Q. I believe you misunderstand me. When the film is received from outside the State, isn't it a fact that is just the celluloid itself?

A. You mean the new film that has not been run? Yes, that is right.

Q. Just the celluloid itself?

A. That is right.

Q. And there may be five or six reels rolled into one bundle?

A. No; they come in individual cans, individual package or can, and that is put together by our inspectors over there.

Q. How much comes in each can?

A. Supposed to be close to a thousand feet.

Q. In each can?

A. Yes sir.

Q. Is that thousand feet featured off according to reels or not?

A. No; it is eventually measured off to reels; originally it is measured off by feet.

Q. But not when it is received?

A. Yes.

Q. You mean it is measured off in reels when it comes in from New York?

The Court: You mean it is not on a reel?

A. It is not on a reel, no.

By Mr. Ferguson:

Q. Is it in such condition that it could be put in a projection machine for showing?

A. No.

Q. Now describe to the court minutely what is done with this film after it is received at your branch office by your employees.

A. You are referring to new prints?

Q. New prints.

A. We mount the film, what we term "mounting" by taking these thousand foot reels—we take two of them and put them together on a 2,000 foot reel because no reel there to begin with; after mounted on the 2,000-foot reels, the complete picture in itself has been physically inspected and put together, then we put it in what we call our shipping cases which is a steel case.

Q. Do you also put what you call "heads and tails" on these films?

A. Yes.

[fol. 40] Q. Describe those to the court.

A. The head is a piece of film we put on there Operation of Universal Pictures; then we put a head on that one which is nothing but blank film for the benefit of the operator to thread his machine to start the picture right on a given point. Then the tail is just blank *filk*, that is the finishing off of the machine so it won't cut out too abruptly in the operator's machine.

Q. All of that is necessary, isn't it, before the film can be re-shipped from your distribution point here to a theater in Utah?

A. Yes, they go through that procedure.

Q. With every film?

A. Yes.

Q. I will ask you, Mr. Wade, could the shipment of film as you receive it from points outside this State, new film, be reshipped without touching them to a theater for showing in Utah?

A. No.

Q. Now what particular type of picture—does that also cover News Reels?

A. Yes, there is a head title on News Reels too.

Q. The same thing with regard to News Reels?

A. That is right.

Q. Now, after the picture is placed in your metal containers—the reels—I will ask you if these containers are placed in vaults in your office?

A. Yes, they are placed in the vaults if we don't have an immediate shipment.

Q. Now, do you sell any of these pictures to what we call exhibitors or theaters in the State of Utah prior to your receipt of these Feature pictures in your offices in Salt Lake City?

A. Yes, we do.

Q. What proportion of them?

A. Oh I would say at least sixty per cent.

Q. Sixty per cent?

A. Yes.

Q. You sell them without trade screening in the State of Utah?

A. Yes.

Q. Sixty per cent of them?

A. Yes.

Q. Will you describe the procedure you go through with regard to selling sixty per cent before you ship them?

A. We have our representatives that cover the territory that I mention, including myself, and they are constantly calling on the theaters for the licensing of these pictures.

Q. At the time you sell them I believe you have each exhibitor sign an individual contract?

A. Yes, we do.

Q. Now, do you set forth in this contract the exact date on which you will deliver a given picture at that theater?

A. No, we do not—very rare cases.

[fol. 41] Q. Is it not a fact that all you put into this contract is that when the picture is available you will set the dates for showing at the particular theaters in Utah?

A. That is right.

Q. Now, let me ask you this: is it not a fact that only after the film is available in Utah are the bookings made to these various theaters of the dates set?

A. That is right.

Q. Then and only then are the New York offices or the Hollywood offices notified with regard to the exact dates?

A. That is right.

Q. Now, when these films are shipped into Utah, then, for distribution in Utah, it is not known where you will prescribe these particular films, on what particular dates, to what particular theaters, is it?

A. That is right. We don't know at that time.

Q. When the films are received?

A. That is right.

Q. Do you have two types of contract, contracts known as general contract and bidding contract?

A. No.

Q. You don't have that?

A. No.

Q. Now, let me ask you Mr. Wade, you stated that the distribution office, your distribution office handles the billing of these films to the theaters in Utah?

A. That is right.

Q. The transportation billing.

A. That is right.

Q. Do you pay the transportation charges?

A. We do not.

Q. As a matter of fact they are paid by the exhibitors, the theaters?

A. That is right.

Q. Both ways, aren't they?

A. That is right.

Q. Do you handle the billing of the films when they are billed back from the exhibitors or the theaters in Utah to your Exchange?

A. I don't know what you mean by that.

Q. You have a billing that goes out that covers transportation between here and say Price, Utah?

A. That is right.

Q. You make it up in your distribution office?

A. That is right.

Q. That film when transported back from Price to your distribution office, you don't make a billing up on that, do you?

A. No.

Q. The exhibitor himself makes the billing on that?

A. Either the exhibitor or the truck-line or the express company.

Q. Anyway you don't make it?

A. No, we don't make it.

Q. The fact of the matter is you know as a matter of general knowledge that your contracts do provide, Mr. Wade, that the transportation cost——

[fol. 42] The Court: Better get the contract.

Mr. Pugsley: I don't object to that.

The Court: Maybe you don't but I do. We are getting the procedure in as orderly a way as possible here. Any evidence that is not admissible, I will stop him.

By Mr. Ferguson:

Q. Now, in the transportation of film in the State of Utah, isn't it a fact, Mr. Wade, that the great majority of all film is transported to the exhibitor theaters in Utah and returned to your distribution office for checking before they are transported to another exhibitor in Utah?

A. I wouldn't say they all are, no.

Q. I asked you if the majority of them were.

A. I wouldn't know the percentage.

Q. You wouldn't know the percentage?

A. I wouldn't know the percentage; when you say "majority," i.e. I wouldn't know that.

Q. Would you be willing to say the great majority of them were not returned for checking each time?

A. No, I wouldn't be willing to say that.

Q. You wouldn't be willing to say that?

A. No.

Q. Mr. Wade, I will ask you if in playing the pictures through a projector; if there is not, as a matter of fact, an occasional chance for damage to the films?

A. Yes.

Q. How do you determine in you transportation procedure between your distribution point and theaters in Utah, how do you determine, if the films are not returned to you each time, which theatre is liable for damage to these films?

Mr. Pugsley: We object to that as immaterial.

The Court: Overruled.

A. We merely trace back where the film is played,—by the condition of the print. In a case like that, we would merely have to go to the exhibitor, or contact him, and if he had played the picture and the print was in such a condition after it went to the next man, if he could run the print, then the print wasn't in that condition. We merely have to trace it back, have to leave it to the individual himself.

The Court: What counsel is getting at is: do you examine or do you have an opportunity to examine these films between exhibitions on the circuit within the State of Utah?

[fol. 43] A. No, I don't.

By Mr. Ferguson:

Q. Your exchange does not follow that practice?

A. What practice?

Q. Of examining films between showings?

A. Yes, we do, but in your case where a print is circuited——

Q. I didn't ask you if the print was circuited.

A. You said from one theater to another.

Q. I said out to that theater and back to your place. Isn't it a fact that the reason it is established is in order that you might have a chance to inspect the film each time,—is the reason it is required to be returned to your office after showing?

Mr. Pugsley: We object to that; that is not the question he presented.

The Court: He can present another.

Q. I will ask you another question, Mr. Wade, I will ask you if it is not a fact that the main picture distributors of film are in Salt Lake City—if it is not a fact that it is a policy adopted with regard to films, the fixing of liability with regard to transportation of these films in the State of Utah,—if it is not a fact they would prefer, and that they do——

The Court: Now you are getting in trouble there, asking him what the policy is; that calls for a conclusion; now you are asking what somebody else prefers. That is hearsay.

Q. What is the practice with regard to the return of film from an exhibitor theater before shipped to another theater, and not circuited?

A. The practice is the inspection of the film when it returns. It is not always handled that way because of what may be the amount of money we considered involved.

Q. Don't you prefer to handle it that way?

A. We prefer to but the physical distribution doesn't require it.

Q. Why do you prefer to handle it that way?

The Court: What difference does it make what he prefers?

Mr. Ferguson: To show the policy.

The Court: *Lets* find out what the practice is, what they do, but what he prefers to do is immaterial.

Mr. Ferguson: The fact hasn't been brought out, probably [fol. 44] can bring it out by another witness, to explain the nature of the contract for damage to the film, that the large percentage of the practice is to return the film from the exhibitors to the distributors each time before it is shipped out to another.

The Court: He has not testified to that practice. *Lets* find out about that.

By Mr. Ferguson:

Q. Mr. Wade, sometimes you send these pictures out on a circuit as you have described it; that means that the picture goes to one theater, it is exhibited there, that theater sends it on to another one and it is exhibited there, and so on through a number of theaters; finally it is sent back to you. Now you testified between theaters on a circuit showing you don't have an opportunity to examine the film. What I would like to know is: what is your practice where the film is sent on a circuit but sent down to, say, Murray, gets through there and comes back into your Exchange over here? Do you, when it comes back, examine the film to see if it is damaged?

A. Yes, we do.

The Court: Do you do that every time?

A. Yes, sir.

The Court: That a film comes back from a showing of that nature as distinguished from a circuit?

A. We examine it before it goes out again.

By Mr. Ferguson:

Q. With regard to circuiting, let's take an example of a film in a circuit; you send it out on the circuit, we will say to Ogden, by truck, by Wycoff's truck; who is it that pays the freight to the Ogden theater?

A. The exhibitor; the theater man.

Q. When it leaves the Ogden theater after showing, we will say it goes to a Brigham City, Utah, theater, who is it that does the billing?

A. The theater with the truck-pine.

The Court: You covered this; we find out the theaters bill it on, the theaters pay the trucking. You covered that once. As a matter of fact the theater pays the carriage coming back. He testified to all that.

Mr. Ferguson: I believe that is all.

The Court: Any of you other gentlemen desire to cross-examine?

Cross-examination.

By Mr. Rex J. Hanson:

Q. With respect to film which is transported from the [fol. 45] Exchange to a theater owner, the theater owner pays the carriage charges on that film too, doesn't he?

A. Yes sir.

Q. You don't ship any film or pay any carriage charges at all yourself, or your company doesn't?

A. That is right.

Mr. Hanson: That is all.

Cross-examination.

By Mr. Worsley.

Q. I presume when a film is re-examined after showing in Utah at your Salt Lake office and it is found defective and in need of repair, your office corrects that film, makes whatever repairs are necessary?

A. Yes sir.

Q. Also you check to be sure, don't you, that the film reels are properly wound and ready for showing at the next successive theater?

A. That is right; it is inspected every time it goes out before it goes out.

Q. Your inspection covers not only repairs but to see that the film is properly wound and cased?

A. That is right.

The Court: I don't see what materiality that has.

Mr. Worsley: Further handling in Salt Lake.

The Court: Further elaboration of the immaterial.

Mr. Worsley: I have no further questions.

The Court: Have to get it back here and examine it; that is important, has a bearing on the transportation, but the details, what they do with it here, I don't see any importance. Any further questions?

Redirect examination.

By Mr. Pugsley:

Q. You testified on cross-examination that the particular theater which the film is to be sent to wasn't known until the film arrived in Utah. I ask you if that is true of News Reels?

A. No, it is not.

Q. How about the Short Subjects sold in circuit?

A. That would be the same.

Q. The same as News Reels?

A. That is right.

Q. Those are predetermined prior to the time of arrival of the film in Utah?

A. That is right.

Q. Is that statement true as to all Features, that the ultimate destination, as far as exhibition is concerned, is not known when the film arrives in Utah?

A. I would say yes, it is not known.

[fol. 46] Q. Are there occasions, on an emergency, on which the film is sent directly to a theater for exhibition without coming to your Exchange first? I am referring to direct from the New York laboratory?

A. Yes, that would particularly be in the case of News Reels that are shipped directly to theaters from the laboratory in that case.

The Court: In that case (a) you don't have any trucking within Utah problem, and (b) you don't have the issue in this law suit. Isn't any question here about direct shipments from New York and Hollywood into this State to a theater.

Mr. Pugsley: Our position is——

The Court: *Lets* see what you have in mind.

Q. Assuming on certain occasions News Reel goes direct to a theater at a point in Utah, on occasions is that circuited to another theater in Utah without returning to your Exchange?

A. Yes, it could be in Utah or any other State out of the State of Utah too, but from that point on it is shipped to another theater.

Q. You testified as to the return of film for inspection within the state of Utah. I ask you whether that is customary as to News Reels the same as to Feature film?

A. Not so much with News Reels because News Reels is handled more on a circuit from one theater to another without returning to the branch because of the time element involved and the distance between our towns.

Recross-examination.

By Mr. Ferguson:

Q. Directing your attention to Short Subject reels, we will say one particular named reel, Passing in the Night, something like that, do you receive more than one reel of that particular film?

A. You mean one print?

Q. Yes

A. Yes, we do.

Q. You receive five or six from New York or Hollywood?

A. Might be two or three. We don't get them from Hollywood.

Q. Well, out of the State?

A. Yes.

The Court: Where do you get them from?

A. They come from New York or back in the East, New Jersey.

By Mr. Ferguson:

Q. Do you know as a matter of fact when the three prints arrive at your distribution point which one of these prints [fol. 47] go to a particular exhibitor or a particular area?

A. No, we don't. That is a method of booking.

Q. That is all booked here at your distribution office?

A. Yes sir.

Q. Directing your attention to News Reels; when News Reels are circuited, does the same rule apply that each theater re-bills the News Reel by truck or transportation to the other theater in Utah?

A. Yes.

Q. And they pay the transportation charge?

A. Yes.

Cross-examination.

By Mr. Hanson:

Q. With respect to News Reels, isn't it only the larger theaters in Salt Lake City and Ogden who have a predetermined contract with the people in New York for showing the News Reel at a certain time—at a certain date?

A. No; that applies all over.

Q. You mean to say all the small theaters in the small towns have this same type of contract written for large theaters in Salt Lake on News Reels?

A. Yes sir.

Q. The News Reel is shown simultaneously in every theater in the State?

The Court: No, not necessarily simultaneously. What he is saying is, like I subscribe to the Salt Lake Tribune; I go up and purchase a subscription this morning for the Tribune delivered to my door; not only is the Tribune not printed that will be delivered to my door next August 15th but the news it will contain has not yet happened. Exhibitors contract for News Reels in the same way; not only is the News Reel not yet manufactured or made, but the news it contains has not yet happened. He says theaters contract in advance for News Reel, the way you and I contract in advance to buy a newspaper. That was his testimony.

Mr. Hanson: My question is whether or not the larger theaters had the first run on News Reels and would not on——

The Court: If that is of any importance here. I don't see that it is.

Mr. Hanson: I will withdraw it, your Honor.

Dedirect examination.

By Mr. Durham:

Q. Is it possible for the New York office of your company [fol. 48] to tell today, for instance, where all of the News Reels that you handle are—what particular theater they are in?

A. They have an identical record that is established from here in the position, in the time that we place the News

Reel in an individual theater, that is submitted at the same time we submit a license contract, that form is submitted; we have to show the position and the theater and the number of days it is playing in that theater, and they keep an identical chart, what we call News chart—the position, and from that information we advance to them they make entry on their chart back there, so it is identical to what we have here.

The Court: Any further examination of this witness?

Mr. Pugsley: May he be excused at this time?

The Court: You may be excused.

Mr. Worsley: If you propose to show any later contract we will want to examine with regard to that.

Mr. Pugsley: We have no proposal to put in a contract from this company at all.

The Court: You may be excused.

ELLIOTT S. WINDWARD was thereupon called as a witness by the plaintiff, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Durham:

Q. Will you state your full name please.
A. Elliott S. Windward.
Q. What is your occupation Mr. Windward?
A. Office Manager R K O Pictures, Inc.
Q. Where is your office located?
A. 204 East First South.
Q. And where is the home office of R K O located?
A. New York City.
Q. You have heard the testimony of Mr. Wade.

The Court: No, we don't have witnesses compare testimony in that way. Just ask this witness questions.

Q. Will you describe briefly what the nature of your duties are here, Mr. Windward, with R K O?

A. Supervision of operation of the Branch and the Branch personnel.

[fol. 49] Q. You receive motion picture films there, or don't you?

A. Are you talking of new ones?

Q. New motion picture films, where do they come from?

A. From New York and from Los Angeles.

Q. Will you describe briefly how motion picture films are booked in the State of Utah by R K O?

A. There are different procedures of booking; the salesman will secure a date and submit them to the office; the exhibitor will submit them through letter, telephone, telegraph of which other procedures there are; we in turn will endeavor to place the booking in the booking records of the prints we have available.

Q. Does your local office determine the play dates or are they determined by the New York office?

A. The exhibitor determines the play dates.

Q. Can an exhibitor determine any date he wishes?

A. He selects the date; we endeavor to put the booking in the booking records.

Q. If there is a conflict, if the exhibitor wishes a date and you cannot find that date, who determines it?

A. We determine whether we can make the booking or not; if we cannot make that particular date, we in turn notify the exhibitor that it is not open and endeavor to have him select another picture or submit another date.

Q. What role does your New York office play, if any, in determining the date that pictures will be played in Utah?

A. That is specified in the terms and conditions of contract.

Q. Does your local office have the power to make a contract?

A. No; we solicit contracts and New York approves the deal.

Q. Only New York has the power to make a contract?

A. That is right.

Q. Do you have occasion to circuit motion picture film?

A. Yes.

Q. Do you handle News Reels?

A. No.

Q. Do you handle Short Subjects?

A. Yes.

Q. Is there a difference between the handling of Short Subjects and Feature motion picture film?

A. Oh yes.

Q. Will you explain what that is, briefly?

A. Yes. Feature contracts, depending on what we call the caliber or the classification of the production, is booked according to its classification; in other words, a top picture will carry a percentage arrangement.

Q. What do you mean by a percentage arrangement? [fol. 50] A. That is where a picture is sold to an exhibitor under percentage sharing arrangement. We also have what is known as flat rental arrangement.

Q. Who shares in the percentage arrangement? Who receives parts of the box office receipts?

A. The exhibitor and the distributor.

Q. The distributor being the parent company?

A. That is right. Your Short Subjects you were asking about, those in the majority of cases have what is known as no preferred play time; there is no extension of preferred play time on Short Subjects.

Q. If you have booked a particular film in a Utah theater and you receive instructions from your New York office to ship it some place else, what would you do, Mr. Windward?

A. I didn't quite understand that. You mean if we had a booking established on that print and New York asked us to relinquish that booking and the print, we couldn't do it; it would be practically an impossibility without the authorization of the exhibitor; that is his booking; we have confirmed it to him and we would then have to receive his authorization to withdraw that booking; in the event New York was requisitioning that print for some other section, we couldn't take his booking without his approval.

Q. What means of transportation, Mr. Windward, do you use to distribute motion picture film in the State of Utah?

A. *Parcels* Post, trucking, express, and personal pickup.

Q. Who determines which method of transportation will be employed?

A. The exhibitor.

Q. Can you state whether or not your office exerts any control over what shipper will be employed? Must certain

requirements be met by carriers for you to release films to it?

A. He must have the proper credentials involving insurance and protection of the prints while in his possession; he must be a licensed carrier, and he must also be approved by our home office.

Q. The home office requires approval?

A. Yes.

Q. Have you known of occasions where your home office has disapproved carriers within Utah?

A. Not to my knowledge.

Q. After the theater *whixh* has the motion picture film is through with it and is going to circuit it to the next theater, who has the determination where the next showing will be made of that film?

A. The distributor. We do that.

[fol. 51] Q. You do that?

A. We do that.

The Court: That is, the booking?

A. That is the booking problem.

The Court: You have all these pictures booked around a circuit. Your bookings determine. I think that would be obvious.

By Mr. Durham:

Q. Directing your attention to bookings, who determines as between the exhibitor, your office and the New York office in what order bookings will be made?

The Court: He has already explained that. The theater exhibitor requests the film on a certain date, so he starts the thing going, and then if Mr. Windward's office cannot supply the print he advises them and says: don't you want another picture on that date, or do you prefer a different booking date. He has testified to that already.

Q. No booking is made until a contract has been entered into?

A. No.

Q. And no contracts are made except upon approval of your New York office?

A. That is right.

Mr. Durham: I believe that is all.

Cross-examination.

By Mr. Ferguson:

Q. Mr. Windward, in your studio the method and procedure with respect to contracts—when you make a contract with an exhibitor, before sending it to New York, you only enter into it for the number of days in which you will give the exhibitor that picture, not the exact dates?

A. That is right.

Q. The booking is done after the exact dates are set, after the films are available here in Salt Lake?

A. I will give you a little further explanation; we have what is known as competitive bidding in the sale of our product; some of the companies don't have that. In some instances embodied in that bid is included a specific date that that picture will be exhibited; under those circumstances we must, if the contract is approved, book that picture on that definite date. In the event we don't have a print to cover that engagement it is absolutely necessary that we secure a print; if our stock supply of prints are not equal to that, we must have a print. That is a part and [fol. 52] parcel of that contract under a competitive bid and it must be covered.

Q. That competitive bid procedure is followed after the screen showings here in Utah?

A. That is right.

Q. Also, Mr. Windward, when films are received from out of the State, that is, a new print is received from out of the State, before it can be sent on to the Utah theaters for exhibition isn't it necessary that these prints have to be checked, wound on reels, heads and tails placed on them for projection work?

A. Yes, and there is an explanation to that. May I explain it?

The Court: Yes.

A. We have what is known as—all companies do—a territorial break; that is where one of the more outstanding pictures is pre-released, this territory is authorized to have

the distribution of that picture ahead of any other out of the country. In that case there will come into this territory as high as 30 to 40 prints. There has been, I think I would say forty prints of outstanding pictures. Those prints are shipped in here and they are all mounted and ready for distribution the same as our own prints in our own vaults. There is also where a print is borrowed from one Exchange to another Exchange; that print may be a new print from the Los Angeles office, Seattle, or even clear back to New York. That print arrives here mounted and ready for distribution, and after the completion of the engagement it is borrowed—the same as territory breaks; these prints are sent back to the respective offices we control throughout 32 offices in the United States.

Q. On these territorial breaks where forty prints are sent into the State ready to be sent to exhibitor theaters, they come to your film distribution depot here, it that right?

A. Yes.

Q. Then they are sent out by truck, say, they are sent FOB at your office to the exhibitor?

A. Not necessarily truck; by means of whatever selected distribution is made by the exhibitor.

Q. But the transportation contract is entirely between the exhibitor and the carrier?

A. Yes; the only exception I was making is that you were referring to all prints coming in here that had to be mounted; I was making that exception and explaining it to you; there are exceptions.

[fol. 53] Q. There is occasionally that territorial break?

A. Yes.

Q. Is it the usual practice with your company, the RKO people, that after showings of films by exhibitors in the State of Utah, that they be returned to your offices here for checking and inspection before being shown at other theaters?

A. Yes, and on other occasions where the exhibitor himself makes requisition for a circuit between his own theaters, we have that occasion; then the film is circuited by the exhibitor to his next theater and then returned to our office.

Cross-examination.

By Mr. Worsley:

Q. You maintain at all times in Salt Lake City a substantial number of films in storage here, do you not?

A. That is right.

Q. That necessity arises (1) from the lapse between the bookings of the same films, or (2) from the fact there may be films you are holding as to which at one particular time you have no booking?

A. That is right.

Cross-examination.

By Mr. Hanson:

Q. So far as the motor carrier transportation is concerned, your company is primarily interested and only interested in whether or not the carrier is licensed by the State or by the Government in case of interstate, and that it carries insurance, is that right?

A. And his plan of operation enters into it considerably.

Q. Does your company enter into any kind of contract with these carriers at all?

A. No, other than insurance—no, that wouldn't be a contract.

Q. The carrier gets his own insurance and contract with theater owners themselves?

A. And must have a copy of his insurance to prove it is satisfactory.

Q. You have a screening room at your place of business here, don't you?

A. No.

Redirect examination.

By Mr. Durham:

Q. Directing your attention to what is called "junking" of a print, will you describe briefly what the nature of RKO policy is after a film has been liquidated?

Mr. Ferguson: I will object to that as immaterial.

[fol. 54] The Court: It is not proper redirect but I will let him go into it. Objection overruled.

A. The life of a film is determined by the number of bookings; we figure between 45 and 50 bookings is the life of a print. On a technicolor print the life of the bookings is less; it is more perishable a lot of times depending on the handling of the print by the exhibitor. A lot of times the prints are damaged to an extent that they are what we call out of service.

A. When this takes place what disposition is made of the print?

A. After the print is out of service or the contract is liquidated, we dismount the prints and junk them, put them in barrels and ship them back to New York. All that procedure is under the authorization or approval of New York.

Q. Do you know why the prints are sent back to the New York laboratory?

The Court: That is immaterial.

Mr. Durham: I believe that is all.

Recross-examination.

By Mr. Hanson:

Q. Are your company's films screened before they are sent out to the theaters for showing?

A. Practically every feature we have is screened with very few exceptions.

Q. At that screening the exhibitors come in the screening room, look at them and decide which ones they want?

A. They are invited to come in.

Q. And so far as the particular film is concerned you don't know until it has been screened and has been purchased by the exhibitor where it is going to go?

A. That is right, we don't know.

Redirect examination.

By Mr. Durham:

Q. What percentage of the industry, the theaters that you serve, go in for screen showings? It is a large or small percentage?

A. Nil—it is way down. The screening of our pictures I would say there is an average of about six people attend.

Mr. Durham: That is all.

The Court: Any further examination? The court will be in recess five minutes.

[fol. 55] (Recess.)

The Court: Call your next witness.

THOMAS A. MCMAHON, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pugsley:

Q. What is your name?
A. Thomas A. McMahon.
Q. What is your business?
A. Branch Manager, Republic Pictures Corporation.
Q. Where is your place of business?
A. 214 East First South.
Q. Where is your principal office?
A. 1790 Broadway, New York.
Q. State briefly the nature of your responsibilities as Branch Manager.
A. Sale and distribution of motion pictures for the Republic.
Q. In what area?
A. Salt Lake City Exchange, which consists of Utah, Nevada, Wyoming and a part of Oregon and Idaho.
Q. How many theatres are there in that area?

The Court: That is immaterial. How many theatres are there in the State of Utah?

A. I would say practically 90.

The Court: One said 150 and this man says 90.

Q. Mr. McMahon, do you serve all the theatres in the State of Utah?
—. Not all of them.
Q. The figure you have stated, is that the number served by you?

A. That we sell.

Q. Do you know what percentage you sell of the total theatres in Utah?

A. I would imagine we sell about 70 *per-cent*.

Q. From what point is the film produced that comes to you?

A. From Fort Lee, New Jersey, at our laboratories.

Q. Where is it returned after it is liquidated?

A. To Burbank, California, and to Eastman Kodak, in Rochester, New York.

Q. Would you state your method of contracting on the feature film?

A. My salesmen and myself go out and contact the [fol. 56] various exhibitors, the same as Mr. Wade explained, and Mr. Winward.

Q. Do you have any screening of the film?

A. We do not sell the same way as some of the major companies do.

Q. What is the method of booking in advance the exhibition of these features, as to the time of production, in your company?

A. Well, we go out and sell a prescribed number of pictures at the beginning of the sales year. We try to set up a release schedule during the 12 months of the release year, so many pictures for the month, say September, at the beginning of the selling year, and about so many in October. We try to conform to a production schedule.

Q. Calling your attention to the pictures for the 11 months' period, are those normally produced at the time of your contract?

A. No, because they run into story difficulties, production difficulties. We can't always hold to a production schedule.

Q. Are a number of your features what are termed "low budget production"?

A. Yes, quite a few of them.

Q. What is the average time of production?

The Court: What difference does that make, how long it takes to produce a picture?

Mr. Pugsley: Merely to show that the features are contracted for a particular delivery prior to the time of production.

The Court: Ask him about that, if they are contracted for prior to the time they are produced.

Q. Will you answer the question presented by His Honor?

A. Yes, in this way, we go out and sell six Roy Rogers in June. By May of next year we will have completed those six Roy Rogers; so the exhibitor has contracted for six Roy Rogers.

By the Court:

Q. Before they were produced?

A. Yes.

By Mr. Pugsley:

Q. What is the release date?

A. The release date is predicated on the finish date, also the release date set by the Sales Department.

Q. Is that here in the Salt Lake Branch Office?

A. They advise us of the national release date.

Q. Who is that done by?

A. The General Sales Manager in New York.

[fol. 57] Q. Do you handle the production and distribution of short-subject films?

A. We have serials which are made of 13 episodes and run for 13 consecutive Fridays and Saturdays.

By the Court:

Q. Are they contracted for before they are produced?

A. Yes.

By Mr Pugsley:

Q. Likewise contracted for before they reach the State of Utah?

A. That is right.

Q. What is your practice as to the circuit of film in the State of Utah?

A. We try to do that. We operate a minimum number of prints. We try to regulate it as cheaply as we possibly can, and by circuiting we eliminate buying extra prints.

Q. Do you handle anything besides the feature film, the serials? Do you handle any news reels?

A. No.

Q. Do you have any film for the armed services?

A. Yes.

Q. What is the method of distribution on that?

A. We are advised by our home office in New York that we have, now, a short to distribute for the Army, to the various camps; and the San Francisco office of the Army advises us of the bookings to their various camps, and we follow out the procedure for them. They set-up their schedules or bookings.

Q. Are they all booked up from your Exchange here in Salt Lake?

A. Not the Army Air Base, in Great Falls or Fort Harrison.

Q. Do they move to those bases from Utah?

A. Yes.

Q. Do you know whether a common carrier is used for that purpose?

A. That I don't know.

Q. Do you know whether any carrier is used in circuiting from a base in Utah to a base outside of the State of Utah?

A. No, I imagine it would be by Express.

Q. In what type of containers do the films come to you for distribution in this area?

A. In paper cartons, and the prints are in thousand-foot cans, as Mr. Wade explained.

Q. What procedure do you follow for exhibition?

A. We mount them on 2,000-foot rolls, store them in the cans, put them in the vault, waiting for bookings.

Q. Is that true as to all film that comes to you from outside of the State of Utah?

A. With the exception of borrowed prints that we may get from Los Angeles, San Francisco or Denver, which we do get quite a considerable amount of the time.

[fol. 58] Q. Do you have any of those so-called borrowed prints sent directly to the theatres in Utah?

A. Yes.

Q. What happens to them after that?

A. They are returned to the Exchange we borrowed them from.

Q. On occasion, do you circuit those borrowed films in the State of Utah?

A. We have on occasions, yes, when we could get an extended period of time for the *useage* of the print. I might qualify that with the remark that there are times when we can borrow prints out of our Los Angeles Exchange for a period of 30 to 45 days before the Los Angeles City break comes in, then we try to get as many bookings as possible within the 30 days. That is when the circuiting occurs.

Q. After the completion of that circuiting, what do you do?

A. It is returned back to Los Angeles, or wherever we borrowed the print from.

Q. That is shipped how?

A. In the regular container.

Q. Who determines the prints you have available for showing in the Utah area?

A. That is determined by our Print Department in New York, on our past experiences of liquidation with similar type pictures.

Q. When they send these to you for exhibition, from the New York studio, are they designated for the Utah area?

A. For the Salt Lake Exchange area.

Q. Who has the final proof of the acceptance of the contracts that are written to your agency?

A. The General Sales Manager in New York.

Q. What is done, so far as the copy of the contract executed by the exhibitor, is concerned?

A. The copy is retained in our home office, one for our files, and a copy is sent to the exhibitor.

Q. Do you have more than one type of contract that you use, for the printed form?

A. We just have the one type.

Plaintiff's Exhibit 1 marked for identification.

Q. I show you what has been marked Plaintiff's Proposed Exhibit No. 1 and ask you to examine it and after examining it will you state what that is?

A. That is our standard form of contract.

(Proposed Exhibit 1 submitted to Counsel.)

Mr. Worsley: No objection.

Mr. Pugsley: We offer it.

[fol. 59] The Court: It may be admitted.

Q. Referring now to Plaintiff's Exhibit No. 1, is this the type of contract that is used in conjunction with every theatre with whom you contract in the State of Utah?

A. Yes.

Q. Is it under this type of contract that your circuiting of films is likewise arranged?

A. There is no contract used for circuiting of films.

Q. You have no contract other than this?

A. No.

The Court: What is the status of the case in the State Court?

Mr. Ferguson: It is held in abeyance; nothing has been done at the present time. There is no service upon the defendants.

Mr. Pugsley: It is not in issue.

Q. Do you have occasion to withdraw the prints from the area over which you supervise?

A. Yes. There are times that we receive calls from New York, from our Print Department, that they are urgently in need of prints—or Chicago or Los Angeles or New York direct.

Q. Do you abide by those directions from the New York office?

A. We try not to upset our picture schedule that we have already maintained with an exhibitor.

Q. By your instructions from your New York office, what is the authority you have to follow for confirmation of a contract without acceptance by New York?

The Court: Why don't you get at it directly: Do you enter into any picture contracts without New York?

A. No sir. They have to approve.

By the Court:

Q. They have the final word?

A. Yes.

The Court: Go ahead.

Mr. Pugsley: That is all.

Cross-examination.

By Mr. Ferguson.

Q. Mr. McMahon, you stated that all contracts must be approved by the office in New York; I mean you stated that the contracts were approved by the office in New York before the films reach Utah?

A. That is correct.

[fol. 60] Q. Were the exact dates of the delivery of films, as to the various exhibitors in Utah affixed in those contracts when they are approved?

A. No, they could not. No.

Q. They could not be, could they?

A. No.

Q. As a matter of fact, Mr. McMahon, they are not affixed until after the film is available in Salt Lake City, is that right?

A. That is right.

The Court: What is that?

Mr. Ferguson: The play dates in Utah.

Mr. Hanson: The exhibit dates.

A. We can see we have an availability date, and we can go ahead and accept dates within that availability date. I may sell a contract now on some features that have already been released. We know the dates on them.

Q. And you will set the exact playing date?

A. You can do it when the pictures are released.

Q. Before the picture arrives in Utah?

A. No, not before it arrives.

Q. The picture must have arrived in Utah?

A. Yes.

Q. That is what you meant when you stated until after the pictures arrive in Utah and are checked and they are placed in the vault to await booking?

A. That is right.

Q. You mentioned borrowing some film from Los Angeles. That does not affect your booking dates in Utah, does it?

A. Oh yes, it does, in this respect, that you maybe have three prints as your normal prints, and you may have

five bookings; so you have to borrow two additional prints from Los Angeles, or wherever you can borrow them, to cover those bookings.

Q. When you ship from Los Angeles, they do not determine when the film will be booked in Utah?

A. No, that is up to us.

Q. Now referring to your contract, I notice in the terms of the contract here—I am referring especially to Section 4, "Loss and damage to prints". What is the procedure of your company under this particular provision of the contract in regard to determining which exhibitor is responsible for loss and damage or what transportation company?

A. As each print comes back, it is inspected and the condition of each one of the releases is noted on what we call a vault card, which gives the exact condition of the print after every run.

[fol. 61] Q. Then, Mr. McMahon, do I understand you that when a film is shipped out of here, we will say to a theatre in Price, Utah, for showing, that the usual practice is for the film to be returned to your studio or your distributing office in order that it may be inspected before it is played in another theatre?

A. We try to do that.

Q. That is the general practice?

A. Yes.

Q. In the cases where you ship film to theatres in Utah, by a common carrier truck line, you deliver that film to the truck line f.o.b. at your distribution office?

A. They pick it up in our office.

Q. And the exhibitor, in all cases, is liable for the freight charges?

A. That is right.

Q. Now the billing that is done with regard to the film is usually according to the exhibitor's wishes, isn't it?

A. The exhibitor enters into the agreement with the common carrier—we don't.

The Court: Any further examination?

Further Cross-examination.

By Mr. Worsley:

Q. Your schedule applies only to the dates after the film is available for showing?

A. It applies to the dates the film will be available for showing, after the national release date.

Q. It has nothing specifically to do with the exact place or date of the showing?

A. No.

Q. On your circuiting, that you mentioned, that is essential where one operator has a series of theatres within Utah, it is not?

A. Not necessarily. We have had occasion to circuit from Price to Huntington, from Price to Dragerton and so on, particularly down in that area, to save our time.

Q. To a different theatre only?

A. That is right.

By Mr. Ferguson:

Q. You say that was in the Price area?

A. Yes.

Redirect examination.

By Mr. Pugsley:

Q. Directing your attention to the carriers, does your company require prior approval of the carriers before they are permitted to transmit or carry your film?

A. They must be bonded, and they must provide insurance, they must carry insurance for loss or damage to the prints.

Q. So far as you know, the three carriers who appear [fol. 62] in this proceeding—the Wycoff Company, Inc., the Milne Truck Line, Inc., and Roy Hill are so approved?

A. That is right.

Mr. Pugsley: That is all.

By the Court:

Q. Mr. McMahon, you testified that the Republic Pictures manufacture serials?

A. Yes sir.

Q. They manufacture pictures like Roy Rogers pictures —what do you call those?

A. Those are Westerns.

Q. Westerns?

A. Yes.

The Court: They are pretty good pictures, too? They interfere with my family life, on television. Now you testified that those are sold and that bookings are made on them before they are produced, sometimes, is that generally so?

A. The Westerns and the lower-grade pictures.

Q. Those are what Mr. Pugsley called budget pictures.

A. That is right.

Q. Are certain dates contracted for on those pictures before they are produced?

A. They try to set them up on a release schedule, I believe, of about every eight weeks or nine weeks.

Q. So you have an approximate date?

A. An approximate date, yes.

Q. You do not have a particular date?

A. No, because it may vary on the production schedule. It may go off, something like that.

Q. When these pictures are produced and shipped in here, are they shipped directly to the theatre that exhibits them?

A. No sir.

Q. Are they shipped to your film Exchange?

A. Yes.

Q. When they arrive at your film Exchange, they are processed as you describe?

A. Yes.

Q. You take them out of a thousand-foot container and put them together and put them in a two thousand-foot roll?

A. Yes.

Q. So you have no immediate need for them?

A. No.

Q. They come to rest in your place of business for a while?

A. For a while.
Q. For a short while?
A. That is right.
Q. Then they are sent out to the trade pursuant to your bookings?
A. That is right.

The Court: All right. Any further examination?
[fol. 63] Mr. Pugsley: We have nothing further.
The Court: All right, step down.
Mr. Pugsley: May he be excused? We offer Exhibit 1.
The Court: It is received.
Mr. Pugsley: May we offer, for the record, the Exhibit which was designated Exhibit No. 1 at the pretrial. As I recall, there was no objection at that time.
The Court: Have it marked for identification.
Mr. Pugsley: It has been marked, I believe, and placed in the record.
The Court: It was marked for the pretrial, but we mark all these Exhibits for the record again at the pretrial.

Plaintiff's Exhibit No. 2 marked for identification.

(Exhibit No. 2 submitted to Counsel.)

The Court: Any objection?
Mr. Worsley: We have no objection.
Mr. Hauson: No objection.
Mr. Pugsley: I offer in evidence Exhibit No. 2.
The Court: It is received. Call your next witness.

CHARLES L. WALKER, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Pugsley:

Q. Will you state your name, please?
A. Charles L. Walker.
Q. What is your business?
A. Branch Manager, 20th Century Fox.
Q. Your location is what?

A. 216 East First South.

Q. Where is your company's principal place of business?

A. 444 West 55th Street, New York City.

Q. In operating your branch office here, are you under the direction of that office in New York, or any other office?

A. Under the direction of the San Francisco office and in turn, New York City.

[fol. 64] Q. I believe you have been subpoened by the State of Utah to appear as a witness here, have you not?

A. I have.

Q. You talked to me yesterday concerning this matter?

A. Yes.

Q. At my request?

A. Yes.

Q. Will you state your procedure in the handling of the bookings and the distribution of feature film?

A. Within the State of Utah?

Q. Within the State of Utah, within your area?

A. Well, the prints that are received from New York are from the laboratories. When they are received they are mounted on the 2,000-foot roll and then put in the cans, awaiting bookings. The sales are handled by myself and the salesmen. We take an application for a contract direct from the exhibitor. Those contracts, in turn, are submitted through the division office in San Francisco and in New York. New York has the final approval of the contract.

Plaintiff's Exhibit No. 3 marked for identification.

Q. I show you what has been marked Plaintiff's Exhibit 3, Mr. Walker, and ask you to examine it.

Q. Will you state what that is?

A. That is a picture contract for our product.

Q. Is this the standard form that you referred to?

A. Yes.

(Submitted to Counsel.)

The Court: Do you offer that?

Mr. Pugsley: Yes, we offer Exhibit 3.

(No objection by other Counsel.)

The Court: It may be admitted.

Q. Do you follow the procedure of screening, in your sale of features?

A. Yes, we very seldom, if ever, solicit the account on feature products until we first have a trade showing. In other words, the print is sent from New York ahead of the actual time we start selling it. We determine a definite date for a trade showing. We notify the exhibitors and after that date we sell the feature. We do not sell it before the showing.

Q. How many prints do you have in your office prior to the trade showing?

A. We always have the one print; sometimes two, three. [fol. 65] or four—whatever our allotment might be.

Q. Do you handle other things besides the feature film?

A. Yes, we handle short subjects; that is, one-reel subjects, the news and the March of Time.

Q. State your method of contract as to the short subjects.

A. On the short subjects we write a contract on the basis of a year, covering the entire product, or a portion of that product. On the March of Time, that is sold on a yearly basis. There are eight issues. They are released on an average of about one every six or seven weeks. The news-reel is sold on a yearly basis. However, there are times we sell some of the accounts one year, two years, three, four or even five years.

Q. The short subjects and the March of Time, are they frequently sold prior to production?

A. Yes, very frequently, on the different years. We will sell the March of Time and the short subjects six months to a year before the particular season involved.

Q. What area do you handle from your office in Salt Lake?

A. We handle the State of Utah, part of Nevada, Montana, Idaho, a few towns in Oregon, and even into North Dakota.

Q. What procedure is followed after the film has been liquidated?

A. After the film has been liquidated we submit a list to New York, on the condition of the individual print, and if they have all played out, they tell us we can junk

the prints, or they tell us to ship the prints to another exchange. They have different areas where they store those films for re-issue purposes in later years.

Q. Do you junk them actually, physically, in the State of Utah?

A. No, we do not. We merely discount them, and the rolls are shipped to Eastman Kodak Company, of Rochester, or Burbank, or the laboratories in New York.

Q. In the re-issue, what is the procedure? Do you retain the film itself here in Utah?

A. What do you mean?

Q. You mentioned some films are retained for re-issue. Where is that done?

A. They tell us to ship certain prints to a certain area like, for instance, to Milwaukee, if they have the proper storage facilities there. When we are through with the print we ship it to that office. Maybe later on we get the print back again, after three or four or five years.

Q. On the return of a re-issue print, does that come on [fol. 66] the reel for exhibition or in the same form you originally had it?

A. They ordinarily come in rolls in tin cans and a pasteboard box.

Q. Do you customarily store film here in Utah for re-issue?

A. We do not.

Q. Do you have some exception to that custom?

A. We have had one exception in the past years that I have been with Fox. That was on Brigham Young. That picture was released in July, 1940. The picture was junked nationally in about 1943. I retained our prints for the 1947 Jubilee Centennial.

Q. You still have those prints?

A. We still have those prints.

Q. Do you recall how many prints came into your area for the initial showing of Brigham Young?

The Court: How is that material?

Mr. Pugsley: I believe it shows the degree of control from the East.

The Court: It sounds to me like the control was in the West on that one. These people retained it here, because of

a local situation. They retained it for the Centennial. They said, "We would like to keep this," and New York said, "All right."

That is one picture. What we are trying to get at is, what is the general business practice?

You are not going to contend, are you, Mr. Pugsley, that we have to look at each one of these films that comes here, and the circumstances surrounding it, to determine whether the carrier of that particular film is within or without interstate commerce?

Mr. Pugsley: No, I believe it is the general field of operation.

The Court: Yes. As a matter of fact, the carrier may be carrying different ones.

Mr. McMahon said the theory of the thing, with the Roy Rogers picture, was that it is sometimes sold before it is manufactured.

Mr. Windward and the other gentleman, Mr. Wade, said that newsreels are sold before they are manufactured.

[fol. 67] Well now, suppose you have Mr. Wycoff going down Highway 91 with three rolls of motion picture film in his truck, one a newsreel and one a Roy Rogers or a serial and a third one of these big feature pictures, which not only has not been sold before it was produced, but it was not sold, as Mr. Walker said, until after they had a showing and invited the trade in to see it.

Now, what is the nature of that transportation? Is it intrastate or is it interstate? Are you going to take the position, because of the newsreel or the short subject picture, that Wycoff can't be regulated by the different regulatory commissions of the State of Utah?

Mr. Pugsley: It is our position that the newsreel, the short and the features are all interstate in character.

The Court: Your contention is that everything is interstate?

Mr. Pugsley: That is right.

The Court: On the basis of the evidence that has been coming in, what do you rely on?

Mr. Pugsley: We rely on the fact there is continued control outside the State of Utah for presentation of this product and return of the product. It is not merely for

consumption in Utah. There is no resale, no change of ownership at all.

The Court: Do you have any authority for that?

Mr. Pugsley: Yes, I think we have quite a few authorities.

The Court: Give me one.

Mr. Pugsley: First is a decision from the case that is summarized very nicely in the Rush case, by the Interstate Commerce Commission.

The Court: That is what case—what is the name of that?

Mr. Pugsley: Rush Motor Carrier application. It is 17 motor carrier cases, page 661.

The Court: When was that decided? But, I am not bound by any decision of the Interstate Commerce Commission.

Mr. Pugsley: That is correct. That is not conclusive.

[fol. 68] The Court: Have you any authority that would be binding on this Court?

Mr. Pugsley: The Republic Pictures Corporation versus Kappler Brothers—151 Federal 2nd, 543.

The Court: What circuit is that in?

Mr. Pugsley: I think that is Iowa.

The Court: That is not binding on this Court.

Mr. Pugsley: It was affirmed by the Supreme Court of the United States.

The Court: Did the Supreme Court write an opinion?

Mr. Pugsley: No, it was affirmed, and after that, rehearing was denied.

The Court: What you are saying there is that certiorari was denied.

Mr. Pugsley: The certiorari was not denied. The rehearing was denied. It was affirmed.

The Court: Affirmed without an opinion?

Mr. Pugsley: That is as I recall, your Honor.

The Court: What else do you have?

Mr. Pugsley: A federal case, 167 Federal 2d, 700.

The Court: Is that the Tenth Circuit?

Mr. Pugsley: No, I think that is the Seventh Circuit.

The Court: All right.

Mr. Pugsley: We do not have a Tenth Circuit decision. We have a United States Supreme Court decision.

The Court: Are those Supreme Court decisions in point?

Mr. Pugsley: We believe they are. They discuss the nature of transportation of films, the method of handling them, the method of the industry's treatment of the film, the continued control of the same, and the fact that it is interstate in character. That, of course, we think is the issue here.

The Court: Well, now, here these people run a local business.

[fol. 69] Mr. Pugsley: A branch, your Honor.

The Court: Yes, but it is a local business.

The Witness: They are not producers, they are distributors. As a matter of fact, the distributing corporation is separate in most of these motion picture concerns from the producers' corporation.

The Court: Is that true of Twentieth Century-Fox?

The Witness: No.

The Court: The producer also distributes?

The Witness: That is correct.

The Court: Well, it is true of Paramount. Paramount has a producers' corporation and a separate distributing corporation. As a matter of fact, they get down to several affiliated corporations that own local theatres. That is true of Paramount, and Fox, too, isn't it?

The Witness: Yes.

The Court: I have some other cases pending in this court, involving that.

Now, the film comes in here and is booked by the local agency and sent out to the theatres, and the theatres use it up. After a while it has deteriorated to a point where it is not usable any more, so they box the thing up and send it to the Eastman Kodak Company for some purpose or another, or they send it down to Burbank, California, or send it back to New Jersey or New York. It is taken out of distribution. The product is used up, in other words. Where was it used up? It was used up right here in the state of Utah.

Mr. Pugsley: We contend it did not come to rest at any time in Utah. It was not consumed. But each one of these exchanges encompass more than the state of Utah. So the movement in the state of Utah to another point in the state of Utah is still a part of the initial intention of the shipper, to keep it moving around, and keep it circulating. It may

come to rest for a time, but it is not limited to consumption in Utah.

The Court: You may go ahead with your examination.

[fol. 70] By Mr. Pugsley:

Q. Is it your custom in the operation of your exchange to notify the New York or San Francisco office of bookings on film?

A. Only on a first run basis in Salt Lake City, Butte and Great Falls and so forth.

Q. I believe you stated that the contract that has been referred to as Exhibit No. 3, that form is sent back to the home office?

A. That is right.

Q. What do they do with those contracts after signing by them?

A. They return us the office copy and the exhibitor's copy. We, in turn, send the exhibitor's copy direct to him.

Q. Do you handle the distribution of film by the armed services?

A. I can't say definitely whether we are right now. We have in the past. You mean the subjects that were made by the army?

Q. Yes.

A. We have handled those.

Q. Are those handled in the state of Utah in a different method than you designated as to the feature film and shorts?

A. The bookings of those government shorts is controlled by the Army Motion Picture Service, with a branch at the present time in San Francisco.

Q. You do not handle those at the present time?

A. No.

Q. Do you handle the distribution of this advertising, Mr. Walker?

A. No, we do not.

Q. By whom is that handled?

A. The National Screen Service.

Mr. Pugsley: We have nothing further at this time.

Cross-examination.

By Mr. Ferguson:

Q. Mr. Walker, as a general business practice the film, when it comes in here, the prints when they arrive from outside the state arrive not on finished rolls, but probably in thousand foot bundles or rolls and do not have any heads or tails on them, but are not fixed in such a way they could be put on projecting machines?

A. That is correct, except the film that we borrow from other exchanges.

Q. That is the exception?

A. That is right.

Q. In other words, none of these prints when they arrive here from out of the state could go on to the theatres in Utah for exhibition without being handled here and checked, and heads and tails placed on them, placed on the rolls?

A. There would be one exception. That would be a news [fol. 71] reel. Sometimes the news reel is shipped direct to the theatre.

Q. That is an exception?

A. Yes.

Q. What is your general business practice with regard to determination of bookings and playing theatres after your contract has been signed?

A. The contract usually carries that prov-sion as to the number of days, preferred time.

Q. Yes?

A. That is a part of the contract.

Q. Just the number of days?

A. The number of days, the date or the week.

Q. Are the exact dates determined?

A. Not as a general rule.

Q. Isn't it a fact that as a matter of general procedure not until the film arrives in Salt Lake are these booking dates set with the theatres in Utah?

A. That is correct.

Q. And as a general business practice with your company, in all cases, the transportation contract is between the exhibitor and the carrier?

A. It is between the exhibitor and the carrier.

Q. And the exhibitor pays the charge?
A. They designate how they are to ship.

The Court: Any further examination?
Mr. Worsley: We have nothing.
Mr. Pugsley: We have nothing further.
The Court: Step down. Do you desire to excuse this witness?
Mr. Pugsley: We have nothing further.
The Court: Do you desire to excuse him?
Mr. Ferguson: We will excuse him.
The Court: You may be excused, Mr. Walker.

(Discussion with respect to next witness.)

STIPULATION RE TESTIMONY OF DON TIBBS

The Court: Who is your next witness?
Mr. Pugsley: Don Tibbs.
The Court: Can you stipulate?
Mr. Pugsley: We can stipulate his testimony would be the same as Mr. Tom McMahon. He is also one of those low budget picture distributors.
[fol. 72] The Court: Whom does he represent?
Mr. Ferguson: Republic.
Mr. Pugsley: No, he represents Monogram.
The Court: Monogram?
Mr. Pugsley: Yes.
The Court: Well, what you are going to have him testify to is that he produced the serials or westerns for some of these low budget pictures, that the producer contracts with the theatre owner or exhibitor to sell him those pictures even before they are produced or are in the state of Utah. Is that what you have in mind?
Mr. Pugsley: That is correct.
The Court: Do you people want to stipulate that is what the man would testify to if he were called?
Mr. Worsley: Yes, we will so stipulate. He could testify to the lease of the rolls, but not the showing.
Mr. Ferguson: That is right.
The Court: I asked him about that, and Mr. McMahon's testimony was that they tried, with their production sched-

ule, to meet in a general way the time for the exhibition, but it was not tied down to any particular date. Now, I suppose your man will testify to about the same thing.

Mr. Pugsley: Yes, Mr. Gibbs would so testify.

The Court: All right. Then is there anything else you want him for?

Mr. Pugsley: No, that is the only testimony.

The Court: Then you can dispense with him.

Mr. Pugsley: Yes.

The Court: Have you any other witnesses you desire to call, Mr. Pugsley?

Mr. Pugsley: No. But we would like, before resting, as to the intervenor, Mr. Hill, it is stipulated he has applied for and received from the Interstate Commerce Commission authority to transport motion picture film within the state of Utah, to points and places within the state of Utah.

[fol. 73] Mr. Hanson: That is not material.

The Court: I can't see the materiality for that. What do you claim for it?

Mr. Pugsley: As a part of their answer they denied that they have that authority, and allege affirmatively that they would be prejudiced by the decision in this case if they are not permitted to intervene showing their authority.

The Court: Suppose the Interstate Commerce Commission has given a certificate of convenience and necessity to Mr. Hill to transport the motion picture film in the state of Utah?

Mr. Hanson: If it has been done—.

The Court: Well, suppose it has been done. That is immaterial. We are here to determine the nature of this, and whether the Interstate Commerce Commission has or has not issued a certificate has no bearing on that. It is immaterial what the Interstate Commerce Commission has done or what the Interstate Commerce Commission thinks about the particular thing. What the Interstate Commerce Commission has done is not material.

Mr. Pugsley: He has applied to the Interstate Commerce Commission for authority to transport motion picture film.

The Court: That would show what he thinks. That is immaterial in the first place, because that is the very issue that this court is going to decide. And what you are ask-

ing me now to do is to let you put in evidence that the Interstate Commerce Commission thinks I ought to decide that it is interstate commerce, and you want to put in evidence that Mr. Hill thinks I ought to decide it is interstate commerce. I can't permit you to do that.

Mr. Pugsley: We have nothing further. We will rest.

Mr. Ferguson: We will submit it.

The Court: You have no evidence?

Mr. Ferguson: We have evidence, but I think most of it is repetitious.

Mr. Worsley: The court has the picture.

The Court: Well, this is your lawsuit. If you gentle- [fol. 74] men desire to rest, and you have nothing you want to add to this picture—.

Mr. Worsley: May we take a moment? We have not had an opportunity to discuss this. Do you want to give us three or four minutes?

Mr. Hanson: If we may have two or three minutes, your Honor?

The Court: The court will recess for two or three minutes.

(Recess.)

(Recess to two o'clock p. m.)

COLLOQUY

(Argument and further citation of authorities; 17 motor carrier cases, also the Rush Motor Carrier application.)

The Court: In the Rush case, that involved shipments of ore and ore concentrates that were loaded at a mine in the state of Idaho, by motor carrier, a truck, pursuant to a contract with a mining company, and that truck line carried the ore to a railroad station. There they put the ore into rail cars for a movement which was exclusively destined out of the state. Now, how could you say that would apply here?

Mr. Durham: When this product left New York City it was indicated that it would go to distributors outside Salt Lake City as well as in the city.

The Court: In the Rush case the intention was to send it right out of the state. Now, in our case here, these cans of motion picture film come into this state. They are destined for use in this state.

Mr. Durham: All of the other states.

The Court: Not the ones that come in here, necessarily. Maybe some of those that come in here will be sent out beyond, to a circuit that involves Idaho, Montana or Wyoming. But those films, when they come in here, are destined for use in this state. They are sent not for the theatre, but they are sent to a film exchange, to a distributor on East First South. When he gets the film it is not in shape for exhibition. He has to take it out of the container in which it has been shipped. It comes in, in a container that contains [fol. 75] only one thousand feet of reel.

So he takes it out of that. He runs it on a motion picture machine. He fits them together. He gets two thousand feet of film put together. And then he attaches the proper headings for it. The headings—if it is M. G. M., he puts that writing on it. Or if it is Republic, he shows something about Republic—different headings of that kind.

Then he prepares the strip of film so it will fit into the machine, and at the end he has another strip.

After servicing that film in that fashion he runs it onto a reel, which is the reel that it goes out on. Then he puts that in the vault.

When they are ready to send them out to one of the theatres he calls up a carrier and the carrier hauls it down there, and the theatre owner pays the carriage charges on it.

When the theatre owner is through with it, he calls up a carrier, and the carrier picks it up, and the theatre owner pays the carriage charges again, and it goes back to the film exchange, or in some cases it is moved from one theatre to the next one.

Sometimes the circuit is entirely in the state of Utah, sometimes across the state line. When you cross the state line you get into interstate commerce on that shipment. But I very seriously doubt that you have a transportation within the state of Utah that is interstate in character, between Film Row and a theatre in Utah, or between the theatre in Utah and back to Film Row, or between theatres on a circuit entirely within the state. I don't believe that shipment is interstate in character merely because the producers of this film in Hollywood or New York or New Jersey are producing films to be shipped all over the United States.

I think the motion picture production business is interstate in character. I think the motion picture distribution business is interstate in character. But we are not concerned with that. What we are concerned with is whether this transportation between two points, wholly within the state of Utah, is interstate in character, because of the nature of the motion picture film leasing rather than sale, and because of the control to the extent the evidence may show, [fol. 76] that New York has over the leasing and distribution and so forth of that film out here.

I don't think it is interstate in character. I think it is largely a question of fact, with some legal implications in it.

And unless you have something that you think will be persuasive to the court, I am disposed to decide it that way.

Mr. Durham: I believe we have presented our case as well as we know how.

The Court: These facts are very, very important in cases of this kind. They are factual questions very largely.

Well, Mr. Ferguson and Mr. Hanson and Mr. Worsley, if you gentlemen will prepare findings, judgment in the case will be for the defendants Public Service Commission of Utah, Hal S. Bennett, Donald Hacking and W. R. McEntire, and Intervenors Melva Seamons, Roy Hill and Joseph J. Milne Truck Lines, Incorporated.

(Reporter's Certificate omitted in printing.)

Here follow 4 Photolithographs, side folios 77-78, 79-80, 81-82, 83-84

(82A)

Home Office Copy

EXCHANGE _____

THEATRE _____

TOWN AND STATE _____

CONTRACT NO. _____

SALESMAN _____

SALES CONTROL PAGE NO. _____ LINE NO. _____

REPUBLIC PICTURES

SCHEDULE

PLAINTIFF'S EXHIBIT No. 1

FOR THE LICENSE TO EXHIBIT EACH OF THE FOLLOWING MOTION PICTURES, THE EXHIBITOR SHALL PAY TO THE DISTRIBUTOR THE FOLLOWING RENTAL:

NO. AND DESCRIPTION OF PICTURES LICENSED	Consecutive Days Run	GUARANTEED LICENSE FEE (PER PICTURE)		DISTRIBUTOR'S SHARE OF ADMISSION OR BOX-OFFICE RECEIPTS PER PICTURE	SPECIAL TERMS

RUN – CLEARANCE – ADDITIONAL PROVISIONS

RELEASE YEAR OF PRODUCT LICENSED

LICENSE AGREEMENT

AGREEMENT of license under copyright between Republic Pictures Corporation, a New York corporation, (hereinafter named and referred to as the Distributor), party of the first part, and the Exhibitor (hereinafter named and referred to as the Exhibitor) operating the theatre or theatres hereinafter designated, party of the second part.

WITNESSETH: The parties hereto agree as follows:

LICENSE — FIRST: The Distributor grants the Exhibitor, and the Exhibitor accepts, a limited license under the respective copyrights of the motion pictures described in the Schedule hereof and under the copyright of any matter included in sound recorded therewith, to exhibit publicly said motion pictures and to reproduce for public performances such recorded sound in synchronism therewith, but only on 35 mm film, at the said theatre and for the run, the number of consecutive days specified in the Schedule, and on the play dates herein provided for — only, and for no other use or purpose; provided that the reproducing equipment in the theatre will operate reliably and efficiently to reproduce such recorded sound with adequate volume and good quality; and provided further that if copyrighted musical compositions are included in such recorded sound, the Exhibitor will have obtained at the date or dates of the exhibition of each of such motion pictures a valid license to perform publicly the said copyrighted musical compositions. If more than one theatre is herein designated, the said motion pictures are licensed for exhibition at only one of such theatres unless otherwise in the Schedule specifically provided.

TERM AND WARRANTY — SECOND: (a) The Distributor agrees, subject to each and all of the terms and conditions hereof, to deliver to the Exhibitor, and the Exhibitor agrees to exhibit at said theatre, upon the date or dates herein provided for, a positive print of each of said motion pictures, except such as may be excluded, as provided in Clauses FOURTEENTH and FIFTEENTH hereunder.

DAMAGES — FAILURE TO DELIVER OR EXHIBIT, ETC. — (b) If the Distributor shall default in the delivery or the Exhibitor shall default in the exhibition of any of said motion pictures which the Distributor is required to deliver or the Exhibitor to exhibit hereunder, or if the Distributor shall willfully violate any of the provisions of Clause Sixth hereof or shall deliver to the Exhibitor a print of any motion picture which print shall not be in condition for exhibition and for the reproduction of sound as provided in Clause Second (a), the Exhibitor or the Distributor, as the case may be, shall pay the damage so caused, in no event to exceed the fixed sum herein specified as the rental for each such motion picture, or a sum computed as provided in Clause Third (c) hereof if the rental of any such motion picture is to be determined either in whole or in part upon a percentage of the admission receipts of said theatre or any part thereof or upon a percentage of such receipts and a fixed sum; provided that any claim by the Exhibitor with respect to the condition of a print shall be deemed to have been waived by the Exhibitor unless notice of such claim shall have been given by the Exhibitor to the Distributor's exchange from which the Exhibitor is served, by telephone or telegraph, or in person, before or immediately after the first public exhibition thereof by the Exhibitor and written confirmation thereof mailed by the Exhibitor upon the same day to the Distributor's said exchange. The Distributor shall not be in default hereunder, unless promptly after the Exhibitor has knowledge thereof, the Exhibitor shall notify the Distributor thereof in writing, and the Distributor shall fail to cure, remedy or remove same within a reasonable time thereafter. The Exhibitor hereby waives any right which it may have to specific performance hereunder.

PAYMENT — THIRD: (a) Exhibitor agrees to pay, as a license fee with respect to each motion picture, the fixed sum, if any, specified in the Schedule, at least three (3) days in advance of the date of delivery or within three (3) days after date of mailing notice to the Exhibitor of tender of delivery of a print thereof at the Distributor's exchange or within three (3) days after the date of shipment thereof to the Exhibitor from another exhibitor, unless after the acceptance of this application by the Distributor, the time of such payment shall be otherwise agreed to by the Distributor in writing signed by an officer of the Distributor. All payments hereunder shall be made to the Distributor at the City in which is located the exchange from which the Exhibitor is served.

PERCENTAGE BOOKINGS — (b) If the rental of any of such motion pictures is to be determined either in whole or in part upon the admission or box-office receipts of said theatre or any part thereof, the Exhibitor agrees to pay such rental immediately after the last exhibition upon the last date of the exhibition of each such picture, or if requested by the Distributor, at the end of each day's exhibition. In each such case the Exhibitor shall deliver to the Distributor immediately after the last exhibition upon each date of exhibition of each such motion picture a correct itemized statement of the gross receipts of said theatre for admission thereto upon each such date. Such statement shall be signed by the Exhibitor or the Manager or Treasurer of said theatre and the Cashier thereof and shall include a statement of such facts and figures as the Distributor may require to be furnished by the Exhibitor, and if requested by the Distributor, shall be made upon forms furnished by the Distributor. Upon the exhibition date or dates of each motion picture licensed hereunder, any person or persons authorized by the Distributor so to do are hereby given the right to observe, check and verify the sale of all tickets of admission to said theatre and the receipts therefrom and the number of persons entering such theatre on such date or dates, and to have access to all parts of said theatre including the box-office and to examine all ticket machines, or other mechanical devices, tickets and stubs at said theatre on said date or dates, and to be allowed to exercise the aforesaid rights, or any of them, from any position or positions in or about said theatre to enable such person or persons to see and count each person entering said theatre and to use a tally register or registers or any other device which he or they may desire to use in the exercise of such rights, and the Exhibitor agrees not to cause, permit or suffer any interference with such person or persons in the exercise of such rights. On such exhibition date or dates or at any time and from time to time thereafter, after as well as before the expiration of the term of this agreement, any person or persons authorized by the Distributor so to do shall have the right to examine and make extracts from or copies of all entries in all books, records and files of the Exhibitor relating to such sale of tickets and admission receipts on such date or dates, and if it is hereunder provided that the Exhibitor may make certain expenditures or deductions, such authorized persons, or any of them, shall have the right to examine and make extracts from and copies of all entries relating to such expenditures and/or deductions.

ADMISSIONS OTHER THAN AT REGULAR RATES — PERCENTAGE BOOKINGS — (c): If the rental provided herein for any picture licensed hereunder shall be determined in whole or in part by the admission or box-office receipts, or any part thereof, the Exhibitor shall not admit to the theatre at which such picture shall be exhibited, on any date on which such picture is exhibited thereat, more than 25 persons without payment of any admission price or at admission prices less than the regular admission price prevailing at said theatre. The Exhibitor shall, without prejudice to Distributor's other rights and remedies hereunder, be accountable for, and shall pay to Distributor the latter's share of, the regular admission price prevailing at said theatre with respect to each person in excess of said number admitted to said theatre on each such date, with the same force and effect as though the Exhibitor had collected such admission price from each such person.

LIQUIDATED DAMAGES — PERCENTAGE BOOKINGS — (d) If the Exhibitor fails or refuses to exhibit any of said motion pictures as herein provided and the rental or any part thereof is to be computed in whole or in part upon a percentage of the admission or box-office receipts of said theatre, the Exhibitor shall pay the Distributor as liquidated damages for each day the Exhibitor fails or refuses to exhibit any such motion picture, in addition to any fixed sums payable hereunder in respect of such motion picture, a sum equal to such percentage of the average daily gross receipts of such theatre on each date any feature motion picture distributed by the Distributor was exhibited thereat during the period of ninety (90) days prior to the date or dates when said picture should have been so exhibited hereunder, or if no feature motion picture distributed by the Distributor was exhibited at such theatre during said ninety (90) day period, then a sum equal to such percentage of the average daily gross receipts of such theatre during the period of thirty (30) operating days immediately prior to the date or dates of such failure or refusal to exhibit; provided that if the exhibitor shall exhibit any such motion picture for less than the full number of days provided for in the Schedule, for each day less than said full number of days, the sum equal to such percentage shall be computed upon a sum equal to the gross receipts of said theatre during the last day of the exhibition thereat of such motion picture. A sworn statement of the said daily gross receipts shall be delivered by the Exhibitor to the Distributor upon demand therefor.

LOSS AND DAMAGE TO PRINTS — FOURTH: The Exhibitor shall pay the Distributor a sum equal to the cost of replacement at the Distributor's exchange for each linear foot of any print lost, stolen or destroyed or injured in any way in the interval between the delivery to and the return thereof by the Exhibitor. Such payment, however, shall not transfer title to or any interest in any such positive print to the Exhibitor or any other party, nor release the Exhibitor from any liability arising out of any breach of this agreement. The Distributor shall at the option of the Exhibitor repay or credit to the Exhibitor any sums paid by the Exhibitor for any lost or stolen print, upon the return of such lost or stolen print to the Distributor within sixty (60) days after the date when the same should have been returned hereunder. The Exhibitor shall not be liable for the damage or destruction of any print, provided the Exhibitor establishes such damage or destruction occurred while in transit from the Exhibitor and delivery thereof was made as hereunder provided. The Exhibitor shall immediately notify the Distributor's exchange by telegram of the loss, theft or destruction of or damage or injury to any print. If any print shall be received from the Exhibitor by the Distributor or any subsequent exhibitor in a damaged or partially destroyed condition, it shall be deemed to have been so damaged or destroyed by the Exhibitor unless the latter, before or immediately after the first public exhibition thereof, shall have telegraphed the Distributor's exchange that such print was received by the Exhibitor in a damaged or partially destroyed condition, and setting forth fully the nature of such damage and the amount of footage so damaged or destroyed.

SELECTION OF PLAY-DATES — FIFTH: Unless otherwise agreed upon or unless definitely specified or otherwise provided for in the Schedule, the exhibition date or dates of each of said motion pictures shall be determined as follows:

1. Subject to prior runs and/or clearance granted or hereafter granted by the Distributor to other exhibitors and within a reasonable time after a print or prints of any of said motion pictures are received at the exchange of the Distributor out of which the Exhibitor is served, and provided the Exhibitor is not in default hereunder or under any other exhibition contract heretofore or hereafter executed between the parties hereto, the Distributor shall mail to the Exhibitor a notice in writing of the date when each such motion picture will be available for exhibition by the Exhibitor (which date is hereinafter referred to as the "available date"). Such notice shall be mailed to the Exhibitor at least fifteen (15) days before the available date therein specified.
2. Within fourteen (14) days after the mailing of such notice, the Exhibitor shall select an exhibition date or dates not theretofore assigned to another exhibitor or other exhibitors within the period commencing upon the available date and ending thirty (30) days thereafter and give to the Distributor written notice of the date or dates so selected.
3. Upon the failure of the Exhibitor to so select such date or dates the Distributor may designate such date or dates by mailing written notice thereof to the Exhibitor.

CLEARANCE AND RUN — SIXTH: If (but only if) a "run" is separately stated on the Schedule to be granted exclusively to the Distributor, the Distributor agrees not to exhibit or grant a license to exhibit any motion picture licensed hereunder for exhibition on the same "run" or prior to the expiration of the "clearance period," if any, in the Schedule specified at any theatre named therein or within the territorial limits specified in the Schedule. Such period of clearance as to each such motion picture shall be computed from the last date the exhibition thereof licensed hereunder. If the clearance granted hereunder shall be determined to be unreasonable as to time or area by any decision, judgment, order or decree in any judicial or arbitration proceeding, then same may, upon written notice by Distributor to Exhibitor, be reduced, as to licensed pictures thereafter exhibited hereunder, to the period and area as shall be in conformity with such decision, judgment, order or decree without any liability or recourse against Distributor in favor of Exhibitor on account thereof and without otherwise affecting this agreement. If it shall be established by any decision, judgment, order or decree in any judicial or arbitration proceeding that any other theatre or exhibitor is entitled to the same run as is hereunder granted to Exhibitor, or a run similar thereto or in conflict therewith, Distributor may grant to such other exhibitor or theatre the run to which it may be entitled under such decision, judgment, order or decree, without any liability or recourse against Distributor in favor of Exhibitor on account thereof and without otherwise affecting this agreement — If the license granted herein is subject to any prior run, any booking by the Exhibitor of a picture licensed hereunder, or confirmation of such booking by the Distributor, is subject to change by the Distributor at any time prior to exhibition of such picture by the Exhibitor, in order to permit such prior run.

DESCRIPTION OF PICTURES — SEVENTH: (a) The Distributor, or the producer of any of the motion pictures licensed herein, shall have and hereby reserves the right, in the sole discretion of the Distributor, or the producer thereof, at any time, to change the title of any of such motion pictures, to make changes in, alterations and adaptations of any story, book or play of or in connection with any such motion pictures, and to substitute for any thereof any other story, book or play. The Distributor, or the producer thereof, shall have and hereby reserves the right to change the director, the cast, or any member thereof, of any said motion pictures.

(b) The Exhibitor shall not be required to accept for any feature motion picture expressly described in the Schedule as that of a named star, director, author, book or play, any motion picture of any other star, director, author, book or play, nor to accept any other feature motion picture in place of any thereof which in the Schedule is designated "no substitute." The right of rejection conferred on the Exhibitor by this Clause is in addition to the right of exclusion provided in Clause Fifteenth hereof.

(c) The Distributor warrants that none of said motion pictures are reissues or re-releases of old negatives, or old negatives retitled, excepting those expressly specified as re-releases in the Schedule.

FORD, FELDMAN, MILESTONE, WELLES, WAYNE, ROGERS, COLOR, ETC. PICTURES — EIGHTH: Anything herein to the contrary notwithstanding, the picture or pictures licensed hereunder shall not include any "color" picture or any picture or pictures not produced by the Distributor or any of its subsidiaries, or any picture or pictures of or in which John Ford, Chas. K. Feldman, Lewis Milestone, Orson Welles, John Wayne or Roy Rogers is or shall be a producer and/or director and/or actor, or any other picture or pictures generally licensed for exhibition by the Distributor pursuant to separate contracts which identify or describe such picture or pictures, in whole or in part, by the name of a producer, director or actor, unless specifically and expressly

Form E9162—125M Sets—25 Sets of 6 to a Pad 1-50 (C)

PLAINTIFF'S EXHIBIT No. 3

(82C)

Printed in U. S. A.

TWENTIETH CENTURY-FOX FILM CORPORATION

FEATURE PRODUCTIONS

EXECUTIVE OFFICES
444 WEST 56th ST.
NEW YORK 19, N. Y.

Zone No._____

Page Two

BRANCH APPROVED COPY

SCHEDULE

✓ PLAINTIFF'S EXHIBIT No. 3

EXCHANGE_____ DATE_____ SALESMAN_____

THEATRE	CODE	EXHIBITOR	LOCATION OF THEATRE

PROD. NO.	TITLE OF PICTURES	CONSECUTIVE NO. OF DAYS AND SPECIFIC DAYS OF WEEK, BOTH INCLUSIVE	MINIMUM GUARANTEED LICENSE FEE	DISTRIBUTOR'S SHARE OF GROSS RECEIPTS	GROSS RECEIPTS IN EXCESS OF WHICH DISTRIBUTOR'S SHARE IS 50%
			$	%	$

RUN_____

CLEARANCE_____

(END OF SCHEDULE)

(Continued from reverse side)

13. TAXES—Exhibitor shall pay to Distributor any and all taxes (or a sum equal thereto) duly imposed or hereafter duly imposed, levied or based upon the license, delivery, exhibition, possession or use by Exhibitor of the prints of the pictures or upon the grant of this license or the exercise thereof or based upon or measured by the license fees or any part thereof, however determined, [illegible] shall be deemed to include but shall not [illegible] to taxes, fees, assessments, charges, imposts,

LICENSE AGREEMENT

(P. 82D)

AGREEMENT made between **TWENTIETH CENTURY-FOX FILM CORPORATION**, hereinafter referred to as Distributor, and the Exhibitor named in the Schedule.

WITNESSETH: The parties hereto agree as follows:

1. **LICENSE**—The Distributor grants to the Exhibitor and the Exhibitor accepts a limited license under the respective copyrights of the motion pictures designated in the Schedule hereof (such motion pictures being herein referred to as "pictures") and under the copyright of any matter included in any sound recorded therewith to exhibit publicly said pictures and to reproduce for public performances such recorded sound in synchronism therewith at only the particular theatre herein licensed for the number of consecutive and particular days of the week all as specified in the Schedule and for no other use or purpose. If copyrighted musical compositions are included in such recorded sound, the Exhibitor shall have at the dates of the exhibition of each picture a license from the copyright proprietor thereof or from the licensee of such copyright proprietor to perform publicly the copyrighted musical compositions. Distributor reserves the right to license the pictures or adaptations thereof, in whole or in part for theatrical, radio or other uses, and Distributor's grant of such rights shall not be construed to be competitive to the license granted to Exhibitor hereunder.

2. (a) **DELIVERY OF PRINTS AND WARRANTY**—After each picture is generally released for public exhibition in the exchange area in which the Exhibitor's theatre is located and becomes available for exhibition by the Exhibitor (as hereinafter provided) Distributor shall deliver to the Exhibitor for exhibition at said theatre for the number of days provided in the Schedule, upon the date or dates determined as herein provided, a positive print of such picture in good condition for use.

(b) **DAMAGES—FAILURE TO DELIVER**—If the Distributor shall fail or refuse to deliver any of said pictures, as herein provided, Distributor shall pay a sum equal to the damage so caused, but not to exceed the license fee payable hereunder as to any such picture. If such damage cannot be definitely computed Distributor shall pay as liquidated damages a sum equal to the fixed rental of such licensed picture, or if the rental of such licensed picture is to be determined either in whole or in part upon a percentage of the admission receipts of said theatre a sum computed as provided in paragraph 4(b) hereof. The Distributor shall not be liable to damages in excess of the sum which would represent liquidated damages as herein provided. Any claim by the Exhibitor with respect to the condition of a print is hereby waived unless notice of such claim shall have been given by the Exhibitor to the Distributor at the exchange from which the Exhibitor is served by telephone, telegraph or in person immediately after the first public exhibition thereof by the Exhibitor and written confirmation thereof given by the Exhibitor to the Distributor the same day at its said exchange by United States mail.

3. **EXHIBITION AND PAYMENT**—The Exhibitor shall exhibit each of said pictures at the said theatre for the number of and the particular days provided in the Schedule upon the date or dates determined in paragraph 7 hereof, and in the order of general release by the Distributor in the exchange territory in which said theatre is located. The Exhibitor shall pay for such license as to each picture: (a) All fixed sums or guaranteed sums at least three (3) days in advance of the date of delivery of a print thereof at the Distributor's exchange or of the date of shipment to the Exhibitor from another exhibitor; or (b) Rentals determined in whole or in part by a percentage of the admission receipts of said theatre immediately after the last exhibition licensed hereunder of each such picture, or if requested by the Distributor at the end of each day's exhibition. On all such percentage engagements Exhibitor shall deliver to the Distributor immediately after the last exhibition of each picture a correct, itemized, sworn statement of the gross receipts of said theatre for admission thereto for each day during the exhibition period of each picture for which payment is so required to be made. "Gross Receipts" shall not be less than a figure determined by multiplying the number of persons admitted (less a reasonable number of free admissions) by the quoted admission prices; and if admission prices have been advertised, the quoted prices, for the purpose of this computation, shall be the advertised prices, otherwise, they shall be those posted at the Box Office. The Exhibitor shall also furnish immediately after the conclusion of the engagement of such picture a recapitulating statement and together therewith pay to the Distributor any payment due in connection with such engagement. All such statements shall show the number of admissions at the respective admission prices charged at each performance and the number of free admissions and shall be signed by Exhibitor's manager, treasurer or cashier. Such itemized statements shall be made on forms furnished by the Distributor, if so requested by the Distributor. The acceptance by the Distributor of any statements or any sum tendered by the Exhibitor in full payment of any license fee payable hereunder shall be without prejudice to any of the Distributor's rights and remedies and shall not prevent the Distributor from thereafter disputing the accuracy of such statement or payment. At all times during the exhibition of any picture licensed hereunder Distributor is given the right to have its authorized representatives at said theatre to check the sale of tickets to and persons entering the theatre and all receipts therefrom. Such representatives shall for such purpose have free access to all parts of the theatre and the theatre premises, including the box office and the right to examine any and all ticket machines or devices, tickets and stubs, and all entries in all of Exhibitor's books and records pertaining to gross receipts of any picture hereunder exhibited at said theatre. Distributor is also given the right to audit all of Exhibitor's books and records at any time after the conclusion of the engagement of any such picture, and for such purpose Distributor by its authorized representatives shall be given access to the theatre, including the box office and other places where such books and records are kept. Exhibitor's books and records shall show, among other items, the number of and different prices of admissions and gross receipts at each separate performance during the engagement of such picture, matinee, evening or other performances. If Exhibitor's operating expense is a factor in the computation of the amount payable to the Distributor, the Distributor is granted the further right to audit all the Exhibitor's books and records relating to the Exhibitor's operating expenses. In computing Exhibitor's operating expenses any and all income other than paid admissions to the theatre during the period of the engagement of any picture on a participating basis shall be deducted from Exhibitor's operating expenses. Any information obtained pursuant to the provisions of this paragraph will be treated as confidential except in any arbitration proceedings or litigation with respect to this agreement.

All payments hereunder shall be made to the Distributor at the exchange from which the Exhibitor is served.

4. **DAMAGES—FAILURE TO EXHIBIT**—If the Exhibitor fails or refuses to exhibit any of said licensed pictures as herein provided, the Exhibitor shall pay to the Distributor as liquidated damages: (a) as to any such picture the rental for which is a fixed amount, such fixed amount specified in the Schedule, or (b) as to any such picture as to which the rental or any part thereof, is to be determined, either in whole or in part, by a percentage of the admission receipts of said theatre during the exhibition of such picture, for each day the Exhibitor fails or refuses to exhibit the same, a sum equal to the herein specified percentage of the average of the daily gross receipts of such theatre on all days on which feature motion pictures distributed by the Distributor licensed on a percentage of the admission receipts were exhibited thereat during the period of ninety (90) days prior to the date or dates when such picture should have been so exhibited, or if no such feature picture distributed by the Distributor was exhibited at such theatre during said ninety (90) day period, then a sum equal to the herein specified percentage of the average of the daily gross receipts of such theatre during the period of thirty (30) operating days immediately prior to the date or dates when such picture should have been exhibited. If the Exhibitor shall exhibit such picture for less than the full number of days specified in the Schedule, for each day less than said full number of days, the Exhibitor shall pay a sum equal to the herein specified percentage of sixty-five per cent (65%) of the gross receipts of said theatre during the last day of the exhibition thereat of such picture. In any event the Distributor shall be entitled to receive an amount equal to the fixed sum, if any, specified as the minimum rental therefor.

If the Exhibitor shall fail or refuse to exhibit or pay for any one or more of the pictures, Distributor may, at its option, declare such failure or refusal a breach of this entire contract and all other unperformed contracts between Distributor and Exhibitor and recover from Exhibitor as damages therefor, the amount payable as license fees in respect of all pictures not exhibited and paid for, computed pursuant to the provisions of this paragraph 4.

5. **DELIVERY AND RETURN**—(a) The Distributor shall make deliveries of prints of the pictures by delivery at its exchange to the Exhibitor or to the Exhibitor's authorized agent, or to a common carrier designated by the Exhibitor, or to the United States Postal authorities as agent for the Exhibitor. Exhibitor shall pay all costs of transportation of such prints, reels and containers from the Distributor's exchange or the last previous exhibitor having possession of the same.

(b) The Exhibitor shall return immediately after the last exhibition licensed hereunder, each print received hereunder, with its reels and containers to the exchange of the Distributor from which the Exhibitor is served, or as directed by the Distributor, in the same condition as when received, reasonable wear and tear due to proper use excepted. The Exhibitor shall pay all costs of transportation in returning said print, but if directed by the Distributor to ship such print elsewhere than to the Distributor's exchange, it may send the same transportation charges collect.

(c) If Exhibitor fails to or delays the return of any print to the Distributor or fails to forward or delays forwarding (as directed by the Distributor) any such print to any other exhibitor, it shall pay the Distributor a sum equal to the damage, if any, so caused the Distributor and, in addition, the damage, if any, so caused such other exhibitor.

6. **LOSS AND DAMAGE TO PRINTS**—The Exhibitor shall pay to the Distributor a sum equal to the cost of replacement at the Distributor's exchange of each linear foot of any print, lost, stolen, destroyed or injured in any way in the interval between the delivery to and return thereof by the Exhibitor. Such payment, however, shall not transfer title to or any interest in any such print to the Exhibitor or any other party, nor release the Exhibitor from any liability arising out of any breach of this agreement. The Distributor shall repay or credit to the Exhibitor any sums paid by the Exhibitor for any lost or stolen print, upon the return of such lost or stolen print to the Distributor within thirty (30) days after the date when the same should have been returned hereunder. The Exhibitor shall immediately notify the Distributor's exchange by telegram of the loss, theft or destruction of or damage or injury to any print. If any print shall be received from the Exhibitor by the Distributor or any subsequent Exhibitor in a damaged or partially destroyed condition it shall be deemed to have been so damaged or destroyed by the Exhibitor unless the latter, immediately after the first

[fols. 85-86] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 87] THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER SUBSTITUTING PARTY APPELLEE—August 27th, 1951

On application of appellant, and pursuant to stipulation of the parties, it is now here ordered that the time for the serving and filing of appellant's brief be and the same is hereby extended to and including September 10, 1951. It is further ordered that Stewart M. Hansen be and he is hereby substituted for and in the place and stead of Donald Hacking as a party appellee in this cause.

Argument and submission—November 9, 1951 (omitted in printing).

IN UNITED STATES COURT OF APPEALS

OPINION—December 19, 1951

Harold S. Shertz (Wayne C. Durham was with him on the brief) for Appellant; C. W. Ferguson for Appelees.

Before Phillips, Chief Judge, and Huxman and Murrah, Circuit Judges.

HUXMAN, Circuit Judge:

Wycoff Company, Inc., is a Utah corporation engaged in the transportation of property as a common carrier by motor vehicle. Its business consists of transporting motion picture films and news reels between various picture exchanges in Salt Lake City and between individual exhibi- [fol. 88] tors, both within and without the State of Utah. It holds a certificate of convenience and necessity as to its interstate transportations from the Interstate Commerce Commission, but has refused to acknowledge the jurisdiction of the Public Service Commission of Utah as to its transportation activities beginning and ending wholly within the State of Utah. When the Public Service Com-

mission of Utah sought to exercise jurisdiction over such last named activities, Wycoff brought a declaratory judgment action in the United States District Court for the District of Utah for a judgment declaring that all of its activities were interstate and enjoining the State Commission from interfering with its transportation of motion picture film and news reels over its routes within Utah, as authorized by the Interstate Commerce Commission. The trial court concluded that all transportation of film from the branch distributing offices of distributing companies located in Salt Lake City, Utah, to theatre exhibitors within the State of Utah and transportation of film from one theatre to another within the State was intrastate transportation, subject to the jurisdiction of the State Commission. The court entered an appropriate judgment that the State Commission was not interfering unlawfully with such operations and denied appellant the relief prayed for. The sole question on appeal is whether the intrastate transportations are nonetheless integral parts of interstate transportations.

Most picture films originate in the laboratories of national distributors in New York, New Jersey and Los Angeles. The distributors have set up a system of exchanges in various sections of the country, to which they send all motion picture film for exhibitors in a designated area. Such exchanges are maintained in Salt Lake City, Utah.

All motion picture houses (exhibitors) obtain their films from the national distributors under contract with them. Under such contract an exhibitor may designate the film he desires. He is, however, not entitled to any particular picture at any specified date. The contract is generally executed before a picture is released to the public. It provides that after a picture is released for public exhibition and [fol. 89] becomes available for exhibition by the exhibitors, the distributor agrees to deliver a print of the motion picture to the exhibitor. The film is then sent to the exchange, in this case Salt Lake City, where it is processed and readied for exhibition. In the contract the distributor agrees to make delivery of the film contracted for "to the Exhibitor or to the Exhibitor's authorized agent, by delivery at the Distributor's exchange, or to a common carrier, or to the United States Postal authorities, *as the Distributor may*

elect." [1] The exhibitor agrees to show the film at the designated date and, at the conclusion of such showing, transport it to the next exhibitor at his expense. Thus in rotation each exhibitor agrees to transport the film at his own expense until it reaches the last exhibitor, who then is obligated to deliver it at his cost back to the exchange, from where it is returned to the distributor for final disposal. No film is sold to the exhibitor. The distributor merely licenses the right to exhibit the film. The title at all times remains in the distributor. The inspection and processing of these films in the exchanges are necessary steps before the films can be reshipped to exhibitors' theatres for showing therein.

The legal principles which guide us in determining whether an intrastate shipment is in fact such or is a continuing part of an interstate shipment are clear and well defined. The difficulty as always comes when we seek to apply them to a given state of facts. As stated by the Supreme Court in United States v. Erie R. Co., 280 U. S. 98, "the nature of the shipment is not dependent upon the question when or to whom the title passes * * *" or whether "the transaction is initiated or completed under a local bill of lading which is wholly intrastate * * *," nor yet "by the fact that there may be a detention before or after the shipment on the local bill of lading." If there is a continuing intent that the goods shall be transported until they reach a designated place, the entire transportation is a continuing one, notwithstanding that there may be a temporary stoppage enroute for a particular purpose.[2] In Walling v. Jacksonville Paper Co., 317 U. S. 564, the Supreme Court [fol. 90] reaffirmed these principles in the following language: "If the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points."

Tested by these principles, we think the judgment must be reversed. The distributor did not lose interest in the con-

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[1] Emphasis supplied.

[2] See Atl. C. L. R. R. v. Standard Oil Co., 275 U. S. 257; and United States v. Erie R. Co., 280 U. S. 98, and cases cited therein.

tinued transportation of a film when it reached the exchange. Under the contract, both it and the exhibitor contemplated and understood that the film should continue in transportation until it reached the exhibitor's theatre. The distributor had a continuing interest in the transportation of the film beyond the exchange. While the distributor agreed to make delivery of the film to the exhibitor "at the exchange, or to a common carrier, or to the United States Postal authorities," it retained the right to select the agency to which delivery should be made, for the purpose of continuing the transportation to the exhibitor's theatre. Elliott S. Windward, Manager of R. K. O. Pictures, Inc., testified that it exercised control over the shipper employed to transport the film from the exchange to the exhibitor. He testified that such a shipper "must have the proper credentials involving insurance and protection of the prints while in his possesson; he must be a licensed carrier, and he must also be approved by the Home Office." As long as this control was exercised over the entire journey, it cannot be said that the film "came to rest" at the exchange, as that term is understood, in order to end interstate transportation. We conclude the parties to these contracts contemplated and obligated themselves to a continuous transportation of the film from the distributor to the various exhibitors and back to the exchange, interrupted only temporarily at the exchange for processing of the film and for allocation to the various exhibitors, and that the entire transportation constituted interstate commerce. This conclusion finds support in Republic Pictures Corporation v. Kappler, 151 F. 2d 543, Beggs v. Kroger Co., 167 F. 2d 700, and Transway, Inc. v. Exhibitors Delivery Service, Inc., 51 M. C. C. 263 (1950), upon facts similar to those before us.

Reversed.

[fols. 91-94] IN UNITED STATES COURT OF APPEALS

JUDGMENT

Twenty-third Day, November Term, Wednesday, December 19th, 1951. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, that this cause be and the same is hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court, and that Wycoff Company, Incorporated, a corporation, appellant, have and recover of and from Public Service Commission of Utah, appellee, its costs herein.

By order of December 31, 1951, the time for appellee's petition for rehearing was extended to February 7, 1952.

[fol. 95] IN THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 4293

WYCOFF COMPANY, INCORPORATED, a Corporation, Appellant,

vs.

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, Stewart M. Hanson and W. R. McEntire, Appellees,

and

MELVA SEAMONS and ROY HILL, d/b/a SEAMONS TRUCK LINE, and Joseph J. Milne Truck Line, Inc., a Corporation, Intervenors

Appeal from the United States Court for the District of Utah, Central Division

APPELLEES' PETITION FOR REHEARING—Filed February 6, 1952

To the Honorable Judges of the United States Court of Appeals, Tenth Circuit:

The appellees and intervenors herein respectfully petition this Honorable Court to reconsider its decision and judg-[fol. 96] ment entered in the above entitled cause and to grant a rehearing therein for the following reasons:

1. The majority opinion is based upon an apparent misstatement of important and controlling facts, that is, (a) that the contracts of film exhibition are generally executed before the film is released to the public in Utah, or in other words, physically present and available in Utah for booking and distribution; (b) that the contract of exhibition between the film distributor and theatre-exhibitor provides that local transportation of film within Utah shall be made by the carrier selected by the film distributor rather than by the theatre exhibitor; (c) that the majority of films are transported under a continuing circuiting arrangement beginning at out-of-state film laboratories, and thence to the Salt Lake film exchanges, thence to one theatre after another until all theatres have shown the films, thence back to the

Salt Lake City film exchanges, and thence to out-of-state film laboratories for junking without once coming to rest within the State of Utah, and (d) that there is continuous movement of each shipment of film, presumably in the original package, from out-of-state laboratories to a designated theatre in Utah under a common control, management and arrangement for such transportation, when the indisputed facts of the Record relative to the foregoing are to the contrary.

2. That the opinion has misconstrued or misapplied decisions of the United States Supreme Court, other lower federal courts and tribunals, and the legal principles of such decisions as applied to the facts of this case. Furthermore, the opinion decides a federal question in conflict with leading decisions of the United States Supreme Court, as well as other federal Circuit Courts of Appeal.

[fol. 97] Introductory Statement

The appellees, including intervenors, are fully aware of the desire of this Court to avoid the necessity of rehearing wherever possible. It is the earnest and sincere conviction of appellees, however, that the opinion rendered in this case has assumed certain facts which are directly contrary to the Record, failed to consider other facts which have a direct bearing on the decision, and apparently misinterpreted at least two decisions of the United States Supreme Court, as well as those of other lower federal courts and tribunals, and has decided a federal question in direct conflict with leading decisions of the United States Supreme Court.

Moreover, the decision in this case is of the utmost importance, not only because it directly affects the scope of regulatory jurisdiction of a sovereign state heretofore exercised without question for several decades, but also, because the decision will unsettle important and commonly accepted distribution-transportation practices and principles established and followed for many years by shippers, forwarders, distributors and carriers throughout Colorado, Wyoming, New Mexico, Kansas and Oklahoma, as well as the balance of the United States. It will unquestionably divest several hundred certificated intrastate motor car-

RUN – CLEARANCE – ADDITIONAL PROVISIONS

RELEASE YEAR OF PRODUCT LICENSED

The Exhibitor agrees to play and/or pay for not less than _____ features licensed hereunder per _____ commencing _____

_____ westerns licensed hereunder per _____ commencing _____

and _____ chapters of each serial licensed hereunder per week commencing _____ if and as available, in the order of release, until all motion pictures licensed hereunder (other than those excluded from the license hereunder pursuant hereto) are exhibited and/or paid for. It is further agreed that each chapter of each serial shall be played in consecutive order and that immediately following the playing of the last chapter of a serial, the Exhibitor shall play the first and succeeding chapter of the next serial available and licensed hereunder.

RELEASE-DELIVERY AND RETURN OF PRINTS — TWENTY-FIRST: (a) After each of said motion pictures is generally released for public exhibition and becomes available for exhibition hereunder by the Exhibitor, the Distributor agrees to deliver, subject to each and all of the terms, covenants, provisions and conditions hereof, a print thereof to the Exhibitor.

(b) The public exhibition of any of said motion pictures for at least three (3) consecutive days at prices usually charged for admission to the theatre where so exhibited in the territory wherein is located the exchange from which the Exhibitor is served, excepting any "road show," "tryout," "preview," or "pre-release" exhibitions thereof, shall be deemed the general release for public exhibition of such motion picture, but only in such territory.

(c) The Distributor shall make deliveries hereunder to the Exhibitor or to the Exhibitor's authorized agent, by delivery at the Distributor's exchange, or to a common carrier, or to the United States Postal authorities, as the Distributor may elect. If deliveries are made to a carrier designated by the Distributor or to a post office, they shall be made in time for prints to reach the place where the said theatre is located in time for inspection and a projection thereof before the usual time for opening said theatre.

(d) Exhibitor agrees to return immediately after the last exhibition on the last date of exhibition licensed, each print received hereunder, with its reels and containers, to the exchange of the Distributor from which the Exhibitor is served, or as otherwise directed in writing by the Distributor, in the same condition as when received, reasonable wear and tear arising from proper use excepted. Exhibitor agrees to pay all costs of transportation of such prints, reels and containers from the Distributor's exchange or the last previous exhibitor having possession of the same and of return to the Distributor's exchange; or if directed by the Distributor in writing, to ship such positive prints elsewhere than to the Distributor's exchange, transportation charges collect. It is agreed that the delivery of a positive print, properly directed and packed in the container furnished by the Distributor, to a carrier designated by the Distributor, and proper receipt therefor obtained by the Exhibitor, shall constitute the return of such positive print by the Exhibitor.

(e) If the Exhibitor fails to return or delays the return of any positive print to the Distributor or fails to forward or delays forwarding (if and as directed by the Distributor) any such print to any other exhibitor, the Exhibitor agrees to pay the Distributor the damage, if any, so caused the Distributor and in addition the damage, if any, so caused such other exhibitor. The Exhibitor shall have the right to participate in any compromise of or intervene in any arbitration or legal proceeding based upon any claim for such damage asserted against the Distributor by another exhibitor, notice of which shall be given the Exhibitor by the Distributor.

SEPARATE LICENSING — SCREENING — TWENTY-SECOND: If more than one picture is licensed hereunder, the Exhibitor hereby acknowledges (1) that the Distributor has not required or conditioned the licensing by the Exhibitor of any one or more of said pictures upon any agreement of the Exhibitor to take a license for any one or more other of said pictures, or any other motion picture or pictures, (2) that the licensing of each picture licensed hereunder, and the license fee or Distributor's share of the admission or box-office receipts herein provided, with respect to each such picture, have been separately and severally negotiated and agreed upon, and (3) that the Exhibitor has seen, or has been given due opportunity to see, each and all pictures licensed hereunder of which a print has been received at the Distributor's exchange from which the Exhibitor is served, prior to the execution of this agreement by the Exhibitor.

DESIGNATION — TWENTY-THIRD: The pictures to be included in each of the classes (if any) of pictures licensed hereunder which are described in the above schedule by classes (and not by specific titles thereof), shall be such pictures which the Distributor, in its sole discretion, shall allocate to and designate for each such class. It is understood that the pictures to be included in such given class may not have, at the time of the execution of this agreement, been allocated or designated, and that the above classes may not, at the time of execution hereof, contain any allocation or designation of any particular motion picture, licensed hereunder. Such allocation and designation may be made by the Distributor in respect to each motion picture by written notice thereof to the Exhibitor at or before the time Distributor gives notice to the Exhibitor of the availability of each such motion picture.

The term Distributor, as used herein, shall mean **REPUBLIC PICTURES CORPORATION** or its assignee; and the term Exhibitor, as used herein shall mean

_____

_____

or its assignee (if such assignee is approved in writing by the Distributor).

IN WITNESS WHEREOF, the Exhibitor operating the _____ Theatre, located at _____ in _____ (City and State) has on _____ (Date) executed this application, which, upon written acceptance thereof by the Distributor, shall be deemed to be the license of said Exhibitor for the exhibition of the motion pictures specified in the Schedule, but only at the said Theatre and in accordance with the terms and conditions hereof.

ACCEPTED:

REPUBLIC PICTURES CORPORATION
Distributor

By _____
Authorized Signature

Date _____

_____ Exhibitor
Partnership Corporation Individual (Indicate which)

By _____
Partner Gen. Mgr. Officer (Indicate which)

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77=78

the period commencing upon the available date and ending thirty (30) days thereafter and give to the Distributor written notice of the date or dates so selected.

8. Upon the failure of the Exhibitor to so select such date or dates the Distributor may designate such date or dates by mailing written notice thereof to the Exhibitor.

CLEARANCE AND RUN — SIXTH: If (but only if) a "run" is separately stated on the Schedule to be granted exclusively to the Distributor, the Distributor agrees not to exhibit or grant a license to exhibit any motion picture licensed hereunder for exhibition on the same "run" or prior to the expiration of the "clearance period," if any, in the Schedule specified as to any theatre named therein or within the territorial limits specified in the Schedule. Such period of clearance as to each such motion picture shall be computed from the last date the exhibition thereof licensed hereunder. If the clearance granted hereunder shall be determined to be unreasonable as to time or area by any decision, judgment, order or decree in any judicial or arbitration proceeding, then same may, upon written notice by Distributor to Exhibitor, be reduced, as to licensed pictures thereafter exhibited hereunder, to the period and area as shall be in conformity with such decision, judgment, order or decree without any liability or recourse against Distributor in favor of Exhibitor on account thereof and without otherwise affecting this agreement. If it shall be established by any decision, judgment, order or decree in any judicial or arbitration proceeding that any other theatre or exhibitor is entitled to the same run as is hereunder granted to Exhibitor, or a run similar thereto or in conflict therewith, Distributor may grant to such other exhibitor or theatre the run to which it may be entitled under such decision, judgment, order or decree, without any liability or recourse against Distributor in favor of Exhibitor on account thereof and without otherwise affecting this agreement — If the license granted herein is subject to any prior run, any booking by the Exhibitor of a picture licensed hereunder, or confirmation of such booking by the Distributor, is subject to change by the Distributor at any time prior to exhibition of such picture by the Exhibitor, in order to permit such prior run.

DESCRIPTION OF PICTURES — SEVENTH: (a) The Distributor, or the producer of any of the motion pictures licensed herein, shall have and hereby reserves the right, in the sole discretion of the Distributor, or the producer thereof, at any time, to change the title of any of such motion pictures, to make changes in, alterations and adaptations of any story, book or play of or in connection with any such motion pictures, and to substitute for any thereof any other story, book or play. The Distributor, or the producer thereof, shall have and hereby reserves the right to change the director, the cast, or any member thereof, of any said motion pictures.

(b) The Exhibitor shall not be required to accept for any feature motion picture expressly described in the Schedule as that of a named star, director, author, book or play, any motion picture of any other star, director, author, book or play, nor to accept any other feature motion picture in place of any thereof which in the Schedule is designated "no substitute." The right of rejection conferred on the Exhibitor by this Clause is in addition to the right of exclusion provided in Clause Fifteenth hereof.

(c) The Distributor warrants that none of said motion pictures are reissues or re-releases of old negatives, or old negatives retitled, excepting those expressly specified as re-releases in the Schedule.

FORD, FELLMAN, MILESTONE, WELLES, WAYNE, ROGERS, COLOR, ETC. PICTURES — EIGHTH: Anything herein to the contrary notwithstanding, the picture or pictures licensed hereunder shall not include any "color" picture or any picture or pictures not produced by the Distributor or any of its subsidiaries, or any picture or pictures of or in which John Ford, Chas. R. Feldman, Lewis Milestone, Orson Welles, John Wayne or Roy Rogers is or shall be a producer and/or director and/or actor, or any other picture or pictures generally licensed for exhibition by the Distributor pursuant to separate contracts which identify or describe such picture or pictures, in whole or in part, by the name of a producer, director or actor, unless specifically and expressly otherwise provided in the Schedule.

ADVERTISING PRIOR TO FIRST RUN — NINTH: (a) If the Exhibitor is licensed a subsequent run of any picture or pictures, the Exhibitor shall not advertise any such picture in any way before the completion of all prior run exhibitions thereof, other than by the general advertising of them as a group, without referring to any one of them. For a breach of the provisions of this Clause the Distributor shall have, in addition to all other rights, the right to exclude from this license any motion picture advertised in violation of the provisions hereof, by written notice to such effect mailed to the Exhibitor, and upon the mailing of such notice the license of such motion picture shall terminate and revert to the Distributor, but without prejudice to any and all rights Distributor may have against Exhibitor on account of such breach.

(b) The Exhibitor also agrees that in all advertising and publicity it will announce each picture as a "Republic Picture."

ACCEPTANCE BY DISTRIBUTOR — TENTH: Until accepted in writing by the Distributor, and written notice of acceptance sent to the Exhibitor, this instrument shall be deemed only an application for a license under copyright, and may be withdrawn by the Exhibitor at any time before such acceptance, by the delivery of a written notice from the Exhibitor to the Distributor that unless within five (5) days after the date of receipt of such notice the Distributor shall mail or telegraph to the Exhibitor notice of acceptance of this application, the same shall be deemed to have been withdrawn; and in such event, if the Distributor shall, within five (5) days after receipt of such notice, fail to mail or telegraph to the Exhibitor, notice of acceptance of this application, the same shall be deemed to have been withdrawn. The deposit by the Distributor of any check or other consideration given by the Exhibitor at the time of application as payment for any purpose or the delivery of a print of any of said motion pictures, shall not be deemed an acceptance hereof by the Distributor.

CHANGES IN WRITING — ELEVENTH: This license agreement is complete and no promises, warranties or representations of any kind (express or implied) in reference thereto have been made by either party to the other, except those expressly set forth herein. No change or modification hereof shall be binding upon the Distributor unless in writing and signed by an officer of the Distributor.

ASSIGNMENT — TWELFTH: This license shall not be assignable or assigned by the Distributor or the Exhibitor, without the written consent of the other, except that this license may, without the consent of the Exhibitor, be assigned by the Distributor to any of its subsidiary corporations, or to any other corporation with which it may merge or consolidate or which may acquire all or substantially all of its assets.

TAXES — THIRTEENTH: The Exhibitor agrees to pay, or if the Distributor elects to pay same, the Exhibitor agrees to repay to the Distributor, an amount equal to the aggregate of all taxes now in effect or hereafter imposed or based upon the license, delivery, exhibition, possession or use by the Exhibitor of the prints of the motion pictures licensed hereunder, or upon the grant of such license or the exercise thereof, or imposed or based upon or measured by the license fees, however determined, which shall be paid or payable by the Exhibitor to the Distributor under this license. The word "tax" as used in this paragraph shall be deemed to include, but shall not be limited to, all taxes, fees, assessments, charges, imposts, levies, and exactions, whether denominated a sales, gross income, gross receipts, personal property, storage, use, consumption, license, compensating, excise or privilege tax. If the amount of any tax payable under this clause cannot be exactly determined, the Distributor may estimate the amount of such tax and the Exhibitor shall pay to the Distributor such estimated amount upon demand therefor; provided, however, that upon the determination of the exact amount of any such tax the Exhibitor shall be entitled to repayment of or credit for any excess amount paid, or shall pay to the Distributor any deficiency, as the case may be. Upon the failure or refusal of the Exhibitor to pay any such tax or any part thereof, the Distributor shall have all the remedies herein provided for the collection of license fees as well as all other remedies provided by law.

PREVENTION OF PERFORMANCE — FOURTEENTH: Anything herein to the contrary notwithstanding, if the Exhibitor shall be prevented from exhibiting any of said motion pictures hereunder because of a strike, fire, insurrection, Act of God, public enemy, public calamity, order, decision, judgment or decree of any court of competent jurisdiction, censorship ruling, or for any similar cause beyond the direct control of the Exhibitor, the license in respect of each such motion picture shall terminate and revert to the Distributor, without liability on the part of either party hereto, provided prompt written notice of such termination and the cause thereof is given by the Exhibitor to the Distributor. Anything herein to the contrary notwithstanding, if the Distributor shall be delayed in or prevented from performance of this agreement, with respect to any motion picture or pictures licensed hereunder, because of a strike, fire, insurrection, Act of God, public enemy, public calamity, order, decision, judgment or decree of any court, censorship ruling, delay of any common carrier or of the United States Postal authorities, failure to produce by delay in production of any such picture, inability of Distributor to obtain the necessary print or prints, or any other cause beyond the control of the Distributor, then such delay or prevention of performance shall be excused and all claims or causes of action for damages therefor or arising therefrom are hereby expressly waived and released by the Exhibitor, and the license with respect to such picture or pictures may, at the option of the Distributor, upon giving written notice thereof to the Exhibitor, be terminated, and in such event shall revert to the Distributor, without liability on the part of either party hereto. Anything herein to the contrary notwithstanding, if any motion picture or pictures licensed hereunder shall not in any event be generally released by the Distributor prior to June 30, 1951, in the territory serviced by the Distributor's exchange serving the Exhibitor, such picture or pictures shall, at the option of the Distributor or its assignee, be excluded from this agreement, and the license in respect thereof shall terminate, without liability on the part of any party hereto.

OPTION TO EXCLUDE — FIFTEENTH: If this agreement shall license the exhibition of any pictures which the Exhibitor shall not, before the execution hereof by the Exhibitor, have had an opportunity to view in the city in which is located the Distributor's exchange serving the Exhibitor, the Exhibitor shall have the option of excluding from the license hereunder granted one out of each five such pictures, provided at least five such pictures are licensed hereunder; provided, however, that the Exhibitor shall have no right of exclusion hereunder if and when Exhibitor is in default hereunder, and that the Exhibitor shall not have the right to exclude any picture hereunder unless he shall give the Distributor written notice of such exclusion within ten (10) days after the date when he shall have viewed or had an opportunity to view such picture in said city.

MIDNIGHT SHOWS — SIXTEENTH: The license herein granted for the number of days specified in the Schedule shall not include the right of exhibition at any time previous to dawn of the first licensed and booked date of exhibition, without securing written permission of the Distributor hereunder.

DEFAULT BY EXHIBITOR — SEVENTEENTH: (a) If the Exhibitor shall fail or refuse to pay the rental of any motion picture as provided in this license, or to furnish statements of the receipts of said theatre, if any are required hereunder, or to give any person or persons authorized by the Distributor access to the said theatre, or its box-office, and/or the Exhibitor's books and records relative to motion pictures, the rentals of which are based upon the said theatre's admission or box-office receipts as herein provided, or if the Exhibitor shall fail to comply with the provisions of clause Third hereof in any other respect, or if the Exhibitor shall exhibit or permit the exhibition of any of said motion pictures at any time or place other than as herein specified, or if the Exhibitor shall in any other respect fail, neglect or refuse to pay, keep or perform any of the obligations, terms, covenants, conditions or provisions hereof, or of any other exhibition contract heretofore or hereafter executed between the parties hereto, or if the Exhibitor shall become insolvent or adjudicated a bankrupt, or shall execute an assignment for the benefit of its creditors, or if a receiver or trustee is appointed for any of the property of the Exhibitor, or if the Exhibitor voluntarily or by operation of law should lose control of said theatre, or of its interest therein, or, in the event of the destruction of said theatre or the failure of said theatre, for any cause whatsoever, to be operated in the usual, normal course of business for a period of more than 60 days, then, upon or at any time after the happening of any one or more of said events, the Distributor may, at its option, (1) terminate this license agreement, or (2) suspend the delivery of additional motion pictures hereunder until each and every such default or defaults, event or events, shall be remedied, cured or removed; and it is understood that any such termination of this license agreement by the Distributor shall be without prejudice to the liability of the Exhibitor for any moneys then owing to the Distributor or which may grow due to the Distributor with respect to all motion pictures licensed or agreed to be licensed hereunder, not then exhibited and/or paid for hereunder, irrespective of the time of payment thereof herein provided; and all such moneys owing or to grow due shall, at the option of the Distributor, be immediately payable by Exhibitor to the Distributor. The exercise of any of said remedies or the taking of any such actions by the Distributor shall be in addition to, and without prejudice to, any right or remedy which the Distributor may have against the Exhibitor, at law or in equity, or otherwise, hereunder.

(b) Performance or observance by the Exhibitor of each of the covenants herein contained on its part to be performed or observed shall be a condition precedent to the performance or observance by the Distributor of the covenants or any of them herein or in any other exhibition contract heretofore or hereafter executed between the parties hereto contained on its part to be performed. Exhibitor hereby expressly grants Distributor the further right to demand and receive as a condition precedent to delivery of the print or prints of any motion picture licensed hereunder, payment of all amounts then due, or claimed by the Distributor in good faith to be due, to Distributor from Exhibitor on account of any motion pictures licensed to Exhibitor under this or any other such exhibition contracts, and the Distributor may require payments of all said sums to be made in cash prior to delivery of any such print or prints.

CUTTING OR ALTERATION OF PRINTS — EIGHTEENTH: The Exhibitor shall exhibit each print in its entirety and shall not copy, duplicate, subrent or, except as may be requested in writing by the Distributor, part with possession of any print. The Exhibitor shall not cut or alter any print, excepting to make necessary repairs thereto, or when required by any duly constituted public official or authority or with the written or telegraphic consent of the Distributor.

EFFECT OF PARTIAL INVALIDITY — NINETEENTH: The invalidity of any of the terms or provisions of this agreement under any present or future law shall not affect the validity of any of the other terms and provisions hereof, and the remainder of this agreement shall continue in force with the same effect as if said invalid terms or provisions had not been included herein.

SCHEDULE OF PICTURES — RENTAL TERMS — PLAY-OFF RATE — TWENTIETH: The following Schedule and all the written and printed parts thereof are a part of this license agreement. (continued on reverse side).

(END OF SCHEDULE)

(Continued from reverse side)

13. **TAXES**—Exhibitor shall pay to Distributor any and all taxes (or a sum equal thereto) duly imposed or hereafter duly imposed, levied or based upon the license, delivery, exhibition, possession or use by Exhibitor of the prints of the pictures or upon the grant of this license or the exercise thereof or based upon or measured by the license fees or any part thereof, however determined, paid or payable by Exhibitor to Distributor under this agreement. The word "tax" as used in this paragraph shall be deemed to include but shall not be limited to taxes, fees, assessments, charges, imposts, levies, excises, however designated, whether as a sales, gross income, gross receipts, storage, use, consumption, license, compensating, excise, privilege or other exaction. If the exact amount of any tax is not definitely fixed or cannot be exactly determined, Distributor may estimate the amount of such tax and Exhibitor shall pay to Distributor such estimated amount upon demand therefor. Upon final determination of the exact amount Exhibitor shall be entitled to repayment of any amount paid in excess of the tax. Upon the failure or refusal of Exhibitor to pay any tax Distributor shall have the same remedies as herein provided for default in payment of license fees in addition to the other remedies provided by law.

14. **PREVENTION OF PERFORMANCE**—If the Exhibitor shall be prevented from exhibiting or the Distributor from delivering any of the licensed pictures, by reason of fire, strike, labor dispute, riot, insurrection, war, catastrophe, casualty, the public enemy, legal proceedings, rules and regulations of any governmental body or authority, act of God or the elements, and, without limiting the foregoing, any cause beyond the control of either party, the delivery of pictures hereunder shall be temporarily suspended for the time equal to the period performance is so prevented. Performance shall be resumed by the party so affected immediately after the removal or abatement of the cause of such interruption and the repair of any damage occasioned thereby. If such suspension of performance shall continue for a period of 30 days, this license in respect of each such picture shall forthwith terminate and revert to the Distributor without liability on the part of either party.

15. **DEFAULTS**—If the Exhibitor shall fail or refuse to perform the terms and provisions of this or any other agreement, or any of them, or if the Exhibitor becomes insolvent or is adjudicated a bankrupt, or executes an assignment for the benefit of creditors, or if a receiver or trustee is appointed for any of the property of the Exhibitor, or if the Exhibitor voluntarily or by operation of law should lose control of the said theatre or of his said interests therein, or the entry of an order approving a petition filed by or against the Exhibitor under the Bankruptcy Laws then, upon the happening of any one or more of said events, the Distributor may at its option: (1) terminate this and any other license agreements, or (2) suspend the delivery of pictures hereunder until such default or defaults shall cease and be remedied. The exercise of either remedy by the Distributor shall be in addition to and without prejudice to any right or remedy of the Distributor against the Exhibitor at law or in equity or otherwise provided for in this agreement.

16. **CUTTING OR ALTERATION OF PRINTS**—The Exhibitor shall exhibit each print in its entirety and shall not copy, duplicate, sub-rent or part with possession of any print. The Exhibitor shall not cut or alter any print, other than to make necessary repairs thereto, or when required by a duly constituted public official or authority.

17. **REISSUES**—The Distributor warrants that none of said pictures is a reissue of an old negative or an old negative retitled, except those specified as such in the Schedule.

18. **TICKETS OF ADMISSION**—When pictures are exhibited at a license fee based upon a percentage of the gross Box Office receipts, the Exhibitor agrees that admission to the theatre shall be obtained only by the presentation of a ticket issued at the Box Office of the theatre for each person (child or adult) admitted, excepting a reasonable number of passes. The Exhibitor agrees all tickets shall be serially numbered consecutively in Arabic numbers from 1 up to 500,000. Series of tickets shall be distinguished by using as a prefix to the numbers letters of the alphabet in order starting with the letter "A". Not more than one series of tickets shall be used at any time and none shall be duplicates. Tickets shall bear the name of the theatre for which they are sold and the price of admission and all taxes. Tickets of different admission prices shall have separate and decidedly distinct colors. Only a reasonable number of free admissions consistent with good judgment and general current practices will be issued.

19. **FIRST EXHIBITION**—The license herein granted does not include the right of exhibition at any time previous to Eight A. M. of the first licensed and booked date of exhibition without written permission.

NOTICE TO EXHIBITOR:- If two or more features are licensed herein, it is simply for convenience and this application is a separate application for each picture. The rules of this Company require that each feature should be separately offered to you, the license thereof separately negotiated, and that the license of any picture should not be conditioned upon the license of another.

IN WITNESS WHEREOF, the parties hereto have duly executed these presents this _____ day of _____, 193_____.

TWENTIETH CENTURY-FOX FILM CORPORATION

By _____

Exhibitor: _____
An Individual—A Partnership—A Corporation
(strike out two)

By _____
Partner—Officer
(strike out one)

81=82

other unperformed contracts between Distributor and Exhibitor and recover from Exhibitor as damages therefor, the amount payable as license fees in respect of all pictures not exhibited and paid for, computed pursuant to the provisions of this paragraph 4.

5. **DELIVERY AND RETURN**—(a) The Distributor shall make deliveries of prints of the pictures by delivery at its exchange to the Exhibitor or to the Exhibitor's authorized agent, or to a common carrier designated by the Exhibitor, or to the United States Postal authorities as agent for the Exhibitor. Exhibitor shall pay all costs of transportation of such prints, reels and containers from the Distributor's exchange or the last previous exhibitor having possession of the same.

(b) The Exhibitor shall return immediately after the last exhibition licensed hereunder, each print received hereunder, with its reels and containers to the exchange of the Distributor from which the Exhibitor is served, or as directed by the Distributor, in the same condition as when received, reasonable wear and tear due to proper use excepted. The Exhibitor shall pay all costs of transportation in returning said print, but if directed by the Distributor to ship such print elsewhere than to the Distributor's exchange, it may send the same transportation charges collect.

(c) If Exhibitor fails to or delays the return of any print to the Distributor or fails to forward or delays forwarding (as directed by the Distributor) any such print to any other exhibitor, it shall pay the Distributor a sum equal to the damage, if any, so caused the Distributor and, in addition, the damage, if any, so caused such other exhibitor.

6. **LOSS AND DAMAGE TO PRINTS**—The Exhibitor shall pay to the Distributor a sum equal to the cost of replacement at the Distributor's exchange of each linear foot of any print, lost, stolen, destroyed or injured in any way in the interval between the delivery to and return thereof by the Exhibitor. Such payment, however, shall not transfer title to or any interest in any such print to the Exhibitor or any other party, nor release the Exhibitor from any liability arising out of any breach of this agreement. The Distributor shall repay or credit to the Exhibitor any sums paid by the Exhibitor for any lost or stolen print, upon the return of such lost or stolen print to the Distributor within thirty (30) days after the date when the same should have been returned hereunder. The Exhibitor shall immediately notify the Distributor's exchange by telegram of the loss, theft or destruction of or damage or injury to any print. If any print shall be received from the Exhibitor by the Distributor or any subsequent Exhibitor in a damaged or partially destroyed condition it shall be deemed to have been so damaged or destroyed by the Exhibitor unless the latter, immediately after the first public exhibition thereof, shall have telegraphed the Distributor's exchange that such print was received by the Exhibitor in a damaged or partially destroyed condition, setting forth fully the nature of such damage and the amount of footage so damaged or destroyed.

7. **SELECTION OF PLAY DATES**—Unless otherwise specified in the Schedule, the exhibition date or dates of each of the pictures shall be determined as follows:

(a) Subject to prior runs and clearance granted or hereafter granted by the Distributor to other exhibitors, the Distributor shall mail to the Exhibitor a notice in writing specifying the first date upon which such picture will become available for exhibition by the Exhibitor (which notice is hereinafter referred to as "notice of availability" and which date is hereinafter referred to as the "available date.").

(b) Within fourteen (14) days after the mailing of such notice, the Exhibitor shall select an exhibition date or dates within the period commencing upon the available date and ending thirty (30) days thereafter and give to the Distributor written notice of the date or dates so selected.

(c) If such date or dates are acceptable to the Distributor it shall forthwith confirm the same in writing to the Exhibitor, and the Exhibitor shall exhibit the picture on such date or dates.

(d) If such date or dates are not acceptable to the Distributor it shall promptly notify the Exhibitor and the Distributor and the Exhibitor shall thereafter endeavor to agree upon mutually acceptable exhibition date or dates.

(e) If mutually acceptable exhibition date or dates have not been agreed upon within thirty (30) days after the mailing of the notice of availability, the Distributor shall designate in writing to the Exhibitor the date or dates upon which the picture shall be exhibited, and the Exhibitor shall exhibit the picture on such date or dates.

(f) If the Exhibitor is granted a first run of any picture and shall fail for any reason to exhibit such picture within thirty (30) days after the date or dates fixed as provided in subdivisions (a) to (e), inclusive, of this paragraph 7, or if the Exhibitor is granted a second run of any picture and shall for any reason fail to exhibit such picture within twenty-one (21) days after the date or dates fixed as provided in subdivisions (a) to (e), inclusive, of this paragraph 7, or if the Exhibitor is granted a run subsequent to a second run of any picture and shall for any reason fail to exhibit such picture within fourteen (14) days after the date or dates fixed as provided in subdivisions (a) to (e), inclusive, of this paragraph 7, the clearance, if any, herein granted is waived by the Exhibitor and the Distributor may make such picture immediately available to others. The Exhibitor shall, nevertheless, be obligated to exhibit the picture and pay therefor the license fee specified in the Schedule, and upon failure to exhibit the same to pay such license fee computed as provided in paragraph 4 hereof.

8. **CLEARANCE AND RUN**—The Distributor shall not exhibit or license the exhibition of any of said pictures in conflict with the run or prior to the expiration of the clearance period, if any, specified in the Schedule at any theatre therein named or within the territorial limits therein specified. Such period of clearance as to each of said pictures shall be computed from the last date of the exhibition thereof herein licensed.

The "trade showing", "road showing", "tryout", "pre-view" or "pre-release" of any picture shall not be deemed either a run of any picture or to be in conflict with any license granted hereunder.

If the licensed run hereunder is not a first run, Distributor may license any picture hereunder as a continued first run either at the theatre where the picture is being exhibited as a first run or at another theatre immediately after the first run without any days intervening and prior to any other run, excepting first run. The Exhibitor's availability of any pictures exhibited on a continued first run shall be postponed and any clearance granted the theatre exhibiting such continued first run shall be extended for a period corresponding to the length of such continued first run, unless otherwise specified in the Schedule. The Distributor may require the Exhibitor and the Exhibitor agrees to exhibit on the terms herein specified the pictures herein licensed on any earlier run than herein licensed. The fact that any or all of the within licensed pictures have not been exhibited on any earlier runs than the run herein licensed shall in no wise affect this agreement or release or relieve either of the parties of their respective obligations hereunder.

9. **ADVERTISING**—The Exhibitor shall advertise and announce each licensed picture as "A Twentieth Century-Fox Production" or "A Twentieth Century-Fox Release," as the Distributor may require. In all newspaper advertising and publicity issued by the Exhibitor relating to each licensed picture the Exhibitor shall adhere to the form of announcement contained in the advertising matter issued by the Distributor.

10. **ACCEPTANCE BY DISTRIBUTOR**—Until accepted in writing by an officer of or a person authorized by the Distributor and notice of acceptance sent to Exhibitor, this instrument shall be deemed only an application for a separate and distinct license for each picture appearing thereon and may be withdrawn by the Exhibitor in whole or in part at any time before such acceptance. The acceptance by the Distributor of any check or other consideration given by the Exhibitor at the time of application as payment for any purpose or the delivery of a print of any of the pictures shall not be deemed an acceptance hereof by the Distributor. The rejection by the Distributor or the withdrawal by the Exhibitor prior to Distributor's acceptance of this application with respect to one or more pictures appearing hereon shall apply only to such picture or pictures and any such rejection or withdrawal shall not in any wise affect any other picture or pictures appearing hereon for which the Distributor shall accept this application.

11. **CHANGES IN WRITING**—This agreement is complete and all promises, representations, understandings and agreements in reference thereto have been expressed herein. No change or modification hereof shall be binding upon the Distributor unless in writing signed by an officer of or a person authorized by the Distributor.

12. **ASSIGNMENT**—This agreement shall not be assigned by either party without the written consent of the other.

(Continued on reverse side)

riers now operating within the six western states composing the Tenth Circuit, of a major portion of their traffic and thereby divest them of vital annual operating revenues heretofore enjoyed by them and recognized as rightfully theirs. This loss of traffic and revenues obviously will render the intrastate operating rights of these carriers eventually worthless and bring about general bankruptcy among them, for the decision herein will not only be applicable [fol. 98] to motion picture film but also to commodities generally distributed by national manufacturing and producing industries locally within states. For example, it is difficult to conceive of a single industry operating upon a national scale that does not intend that the commodities they ship to their various state distributors shall be transported to dealers or exhibitors at final destinations within each state. Yet in most instances this type of distribution within a state has long been accepted as intrastate transportation, subject to state regulation.

Unquestionably the decision herein will have a highly detrimental and damaging effect upon the businesses and industries of many people far beyond the interests of the immediate parties involved. We feel that we are not only representing our clients' interests in urging this petition for rehearing, but that we are also representing important principles affecting many people. As Chief Justice Fred M. Vinson noted in his recent address before the American Bar Association, "You represent not only your clients, but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the Country."

We sincerely submit that the opinion herein drastically alters the present concept of the distinction between interstate and intrastate transportation now generally accepted by other courts, national and state regulatory agencies, and the public.

For these reasons we ask the Court's special indulgence in the consideration of this petition, and we trust that our position is sufficiently clarified in the following brief to justify a reconsideration by the Court of its opinion and judgment heretofore rendered in this cause.

[fol. 99] ARGUMENT

I

The Opinion Misconstrues and Ignores Fundamental and Controlling Facts

One of the fundamental premises upon which the opinion is based is that there is a continuing intent that the goods shall be transported until they reach a designated place, and that under the contracts of exhibition, both the theatre-exhibitor and film distributor understood that the film should continue in transportation until it reached the exhibitor's theatre. This presumes, among other things and as the opinion distinctly indicates, that the film is neither within the state of Utah nor released for exhibition to the public at the time the contract is executed. As the Record shows, the majority of films, with the exception of newsreels and a relatively small volume of shorts, have actually been shipped to the distributor in Salt Lake, processed, screened at that office, and stored in vaults before the exhibition contract is either considered or executed.

Mr. Charles L. Walker of 20th Century Fox testified as follows at page 64 of the Record:

> "Q. Do you follow the procedure of screening, in your sale of features?
>
> "A. Yes, we very seldom, if ever, solicit the account on feature products until we first have a trade showing. In other words, the print is sent from New York ahead of the actual time we start selling it. We determine a definite date for a trade showing. We notify the exhibitors and after that date we sell the feature. We do not sell it before the showing."

[fol. 100] Mr. Elliott S. Windward of RKO Pictures, Inc., stated at page 54 of the Record:

> "Q. Are your company's film screened before they are sent out to the theaters for showing?
>
> "A. Practically every feature we have is screened with very few exceptions.
>
> "Q. At that screening the exhibitors come in the screening room, look at them and decide which ones they want?

"A. They are invited to come in.

"Q. And so far as the particular film is concerned you don't know until it has been screened and has been purchased by the exhibitor where it is going to go?

"A. That is right, we don't know."

Mr. Windward testified immediately following the foregoing quote that only a few exhibitors actually attend the showing, but his testimony remains without change that whether the exhibitors attend the film screenings or not, the contracts of exhibition are not executed until after the screening within the State of Utah has occurred. Manifestly, there can be no "continuing" movement where the contracts of exhibition are not even considered nor executed until after the films have arrived at the Utah exchanges, processed, and placed in vaults to await screenings and sales.

Next, the conclusion of the Opinion that there is a "continuing intent that the films shall be transported until they reach a designated place," is based upon a quotation from plaintiff's Exhibit 1, paragraph 21 (e), which is the exhibition contract of the relatively minor film producer, Repub- [fol. 101] lic Pictures. This contract provides that the distributor may elect to make film delivery to the exhibitor or agent by delivery at the exchange to a common carrier, or postal authorities, as the film distributor may elect. This particular provision is apparently quoted and italicized to emphasize that the film distributor and not the theatre exhibitor contracts for and selects the method of transportation. It is true that this contract gives some leeway in this direction, in that it grants an option to the distributor to make delivery of the film to a selected mode of transportation, although in the case of the common carrier, the individual carrier may still be selected by the exhibitor as far as this contract is concerned. However, the oral testimony hereafter quoted makes it clear that selection of transportation is made by the theatre exhibitor and not by the film distributor.

As Mr. Charles R. Wade of Universal International Film Exchange stated at page 37 of the Record:

"Q. Is the point of delivery directed by you or by the individual theater?

"A. The point of delivery?

"Q. Yes.

"A. The point of delivery? It is either by arrangement that the theater man makes with an individual truckline, or he might request we ship it by *Parcels* Post; might be an inland point where he has no means of transportation other than Parcels Post, or if there is no arrangement made at all, we automatically ship the print express."

As Mr. Thomas A. McMahon of Republic Pictures stated at page 61 of the Record:

"Q. In the cases where you ship film to theaters in Utah, by a common carrier truck line, you deliver that film to the truck line f.o.b. at your distribution office? [fol. 102] "A. They pick it up in our office.

"Q. And the exhibitor, in all cases, is liable for the freight charges?

"A. That is right.

"Q. Now the billing that is done with regard to the film is usually according to the exhibitor's wishes, isn't it?

"A. The exhibitor enters into the agreement with the common carrier—we don't."

As Mr. Charles L. Walker of 20th Century Fox Film Corporation stated at page 71 of the Record:

"Q. And as a general business practice with your company, in all cases, the transportation contract is between the exhibitor and the carrier?

"A. It is between the exhibitor and the carrier.

"Q. And the exhibitor pays the charge?

"A. They designate how they are to ship."

As Mr. Elliott S. Windward of RKO Pictures, Inc., stated at page 50 of the Record:

"Who determines which method of transportation will be employed?

"A. The exhibitor."

Moreover, the contract provision cited in the opinion is contrary to that of the major producer, 20th Century Fox,

Film Corporation, plaintiff's Exhibit 3, wherein paragraph 5(a) specifically provides as follows:

> [fol. 103] "5. DELIVERY AND RETURN—(a) The Distributor shall make deliveries of prints of the pictures by delivery at its exchange to the *Exhibitor* or to the *Exhibitor's* authorized agent, or to a common carrier designated by the *Exhibitor*, or to the United States Postal authorities as *agent for the Exhibitor*. *Exhibitor* shall pay all costs of transportation of such prints, reels and containers from the Distributor's exchange or the last previous *Exhibitor* having possession of the same."

The testimony of the witnesses, including the Republic Pictures representative, is repeatedly to the point that it is the theater Exhibitor and not the Distributor who contracts with, pays for, and selects the transportation carrier.

Thus, it is most apparent that although the opinion places stress upon and points out the testimony of Witness Windward, as indicating conclusive evidence of control of entire journey of film by the distributor, yet all four witnesses including Windward, testified that the theater exhibitor and not the film distributor determines the method of transportation within Utah between the film exchange and theaters, employs the carrier, and assumes the responsibility of transportation of film locally in Utah.

Any conclusion based upon the foregoing testimony must be to the effect that control of local transportation is exercised by the theater exhibitors in Utah and that film does come to rest at the Salt Lake exchange.

The evidence in the Record does not support the Court's conception of the flow of commerce, nor of any intention on the part of the contracting parties that such should occur. [fol. 104] The opinion does make a casual reference to processing of the film at Salt Lake City upon initial receipt from New York or Los Angeles, and to the inspection which is made of the film between exhibitions wherever possible. These facts are most important. As is detailed in appellee's brief, films reach Utah from the out-of-state laboratories in large pasteboard cartons—raw celluloid film only—, are reassembled in two thousand foot lengths wound upon metal

reels supplied by the local exchanges, with additional film added known as "heads and tails" to facilitate use in theater projection machines, thoroughly inspected, placed in heavy protective metal containers also supplied by the local exchanges for protection of the film during local handling, and then placed in storage vaults within the local exchanges to await trade screenings, negotiations, and booking arrangements with exhibitor theaters.

As Witness Thomas A. McMahon of Republic Pictures testified at page 57 of the Record:

> "Q. In what type of containers do film come to you for distribution in this area?
>
> "A. In paper cartons, and the prints are in thousand-foot cans, as Mr. Wade explained.
>
> "Q. What procedure do you follow for exhibition?
>
> "A. We mount them on two thousand foot rolls, store them in cans, put them in the vault, waiting for bookings."

As Witness Charles R. Wade of Universal Pictures testified at page 39 of the Record:

> "Q. I believe you misunderstand me. When the film is received from outside the State, isn't it a fact that it is just the celluloid itself?
>
> [fol. 105] "A. You mean the new film that has not been run? Yes, that is right.
>
> "Q. Just the celluloid itself?
>
> "A. That is right."

Mr. Wade further testified at page 39 of the Record:

> "Q. You mean it is measured off in reels when it comes from New York?
>
> "The Court: You mean it is not on a reel?
>
> "A. It is not on a reel, no.
>
> "Q. Is it in such condition that it could be put in a projection machine for showing?
>
> "A. No.
>
> "Q. Now describe to the Court minutely what is done with this film after it is received at your branch office by your employees.
>
> "A. You are referring to new prints?

"Q. New prints——.

"A. We mount the film, what we term "mounting" by taking these thousand foot rolls—we take two of them and put them together on a 2,000 foot reel because there is no reel there to begin with; after mounted on the 2,000-foot reels, the complete picture itself has been physically inspected and put together, then we put it in what we call our shipping cases, which is a steel case.

"Q. Do you also place what you call 'heads and tails' on these films?"

[fol. 106] Mr. Wade further testified at pages 46-47 of the Record:

"Q. Directing your attention to Short Subject reels we will say one particular reel, Passing In The Night, something like that, do you receive more than one reel of that particular film?

"A. You mean one print?

"Q. Yes.

"A. Yes, we do.

"Q. You receive five or six from New York or Hollywood?

"A. Might be two or three. We don't get them from Hollywood.

"Q. Well, out of the State?

"A. Yes.

. . . . . .

"Q. Do you know as a matter of fact when the three prints arrive at your distribution point which one of these prints go to a particular exhibitor or a particular area?

"A. No, we don't. That is a method of booking.

"Q. That is all booked here at your distribution office?

"A. Yes, sir."

Mr. Wade also testified at bottom of page 45 of the Record:

[fol. 107] "Q. Is that true as to all features, that the ultimate destination, as far as exhibition is concerned, is not known when the film arrives in Utah?

"A. I would say yes, it is not known.

Mr. Wade further testified at page 41 of the Record:

"Q. Now let me ask you this: is it not a fact that only after the film is available in Utah, are the bookings made to these various theatres and the dates set?

"A. That is right.

"Q. Now, when these films are shipped into Utah, then, for distribution in Utah, it is not known where you will prescribe these particular films, on what particular dates, to what particular theaters, is it?

"A. That is right. We don't know at the time."

It must be apparent from the foregoing quoted excerpts of testimony offered by the Appellant itself that each single package shipment of raw celluloid film containing, as it does, the territory quota of film for a given exchange could not be and was not intended to be continuously transported until such single package shipment reached a theater in Utah. The theater exhibitor would have no use for three or four issues of one particular picture, and the National distributor has no intention at the time the carton of raw film is shipped that it go to any final theater in Utah. In truth, no shipment of film, in light of the evidence in the record, could be billed on a through interstate billing from an out-of-state laboratory direct to any given theater destination in Utah. The single package carton of film must, of necessity, under the adopted method of distribution, be shipped to a given Salt Lake film exchange where the single package shipment must be broken open, the films inspected, [fol. 108] equipped with "heads and tails," wound upon metal reels, placed in protective metal shipping containers and thereafter lodged in storage vaults to await negotiations, in most instances screenings, and bookings with local theater exhibitors. All this is prior to any local transportation of a single picture in Utah. The films most assuredly come to rest at the exchange. As testified to by Mr. McMahon of Republic Pictures at page 62 of the Record:

"Q. When these pictures are produced and shipped in here, are they shipped directly to the theater that exhibits them?

"A. No, sir.

"Q. Are they shipped to your film exchange?

"A. Yes.

"Q. When they arrive at your film exchange, they are processed as you describe?

"A. Yes.

"Q. You take them out of a 1,000 foot container and put them in a 2,000 foot roll?

"A. Yes.

"Q. So you have no immediate need for them?

"A. No.

"Q. So they come to rest in your place of business for awhile?

"A. For a while.

. . . . . .

[fol. 109] "Q. Then they are sent out to the trade pursuant to your bookings?

"A. That is right."

It is most difficult therefore in light of the foregoing testimony to understand the assumption in the opinion that the films are sent to the theater exhibitors upon a completely pre-determined schedule, and still more difficult to understand the conclusion of the Court that "it cannot be said that the film came to rest at the exchange, as the term is understood, in order to end interstate transportation."

The general finding of uninterrupted flow of transportation of film from out-of-state laboratories to Salt Lake exchanges, thence to theaters and between theaters, thence back to the exchange and from there to the out-of-state laboratories without once coming to rest is indeed puzzling when the undisputed testimony of the witnesses is carefully considered. Despite (1) the complete transformation of the original carton shipment after its arrival at the exchange in Salt Lake City from a pasteboard box full of raw celluloid film—purposely shipped thus so as to classify it for light-weight express rate—into several shipments of film wound upon metal reels in special heavy metal containers taking an entirely different classification and transportation rating, the opinion decides that the film does not

come to rest. Despite (2) the admitted fact that the first leg of the journey from out-of-state to Salt Lake City with the film-distributor being both the consignor and consignee and paying for and controling the transportation, while the second leg of the transportation movement is either by motor common carrier, private car of the theater-exhibitor himself, or by parcel post, admitting of no opportunity for through-route-joint rate arrangements or continuous handling responsibility, and with the local theater-exhibitor paying all charges and taking all responsibility for transportation, the opinion assumes that the film does not come to rest. Despite (3) the fact that the single [fol. 110] cardboard shipment of raw film containing the entire Salt Lake exchange quota could not be billed under a through billing, over a through route and under joint rate to one given theatre destination in Utah because all of the films in the original shipment are not intended to move continuously to any destination, other than the Salt Lake exchange, the opinion herein holds that the film still does not come to rest. Despite (4) the fact that the majority of all film handled by the Salt Lake exchanges must be trade-screened in Utah before contracts can be made, films sold or bookings arranged, still it is held that the film does not come to rest. Surely there must have been some misunderstanding of the facts herein that deserves and merits r-consideration by this court.

Furthermore, it should be pointed out that the continuous flow theory of the opinion would seem to overlook the provisions of the written contract for exhibition, plaintiff's Exhibit 1, and particularly Section 22 (3) thereof, which specifically provides that the exhibitor must have an opportunity to see all pictures licensed under the contract prior to execution of the agreement. It follows that theatre exhibitors in Utah could not be provided with the opportunity of viewing the pictures before executing the contract unless and until the pictures are available in Utah at the Salt Lake exchanges. It is also noted that the last sentence of paragraph 14 of plaintiff's Exhibit 1 contains a provision that if the distributor does not release the film prior to a specified date in the territory, the distributor shall have the right, at its option, to terminate the exhibition

agreement. This would again indicate that from the transportation standpoint, the determining arrangement lies in the booking negotiation at the local exchanges after films have arrived in Salt Lake City, rather than in what we have termed the general exhibition agreement, since the latter seems subject to certain restrictions and possibilities of cancellation.

The foregoing are by no means all of the factual points which must be considered in determining the essential [fol. 111] nature of this transportation. For the reasons indicated, we are firmly convinced that the opinion has neither correctly nor adequately summarized the Record, nor does it reflect an appreciation of the manner in which the film transportation is accomplished.

II

The opinion misconstrues relevant federal authority as applied to the facts of this case.

It is not our intention to review in detail all of the authorities which were cited in appellees' original brief in this petition for rehearing, although we do respectfully urge the Court to reconsider the same.

Our essential concern, however, in this petition, lies in the citation of authorities in the opinion which seems to be diametrically opposed to the indicated holding of the opinion. Thus, the opinion states that if there is a continuing intent that the goods shall be transported until they reach a designated place, the transportation is a continuing one, notwithstanding that there may be a temporary stoppage en route for a particular purpose. In support of this statement, the Court cites *Atlantic Coast L. R. Co. v. Standard Oil Co.*, 275 U. S. 257 known as the Second Standard Oil Case. As an abstract and simplified statement of the law under proper facts, the opinion is correct. It can only be presumed, however, that in citing this case, the opinion concluded that the facts of that case were somewhat similar to those of the instant case, and that the decision supported the opinion. The Supreme Court, however, actually reached the conclusion that the transportation involved, which was factually similar to the instant case, was *intra*state transportation. Since this Supreme Court decision has been long

recognized as one of the leading federal authorities on the relation of distribution of goods and intrastate transportation, we suggest that it is of the utmost importance.

[fol. 112] There, Standard Oil maintained in Florida storage tanks and warehouses for receiving and storing oil products produced and shipped to Florida from other states and countries. From the Florida facilities, the Standard Oil Company reshipped the oil products to local bulk stations in Florida, which in turn shipped them to consumers by means of tank wagons, and in occasional instances, service stations were supplied with gasoline directly from the Florida main storage facilities. It will be noted that in a very broad sense, there was an intention that the products coming from without Florida would necessarily ultimately be delivered to consumers within Florida from the bulk storage facilities. There would seem to be a far closer relationship to a continued transportation in this case than in the instant case, where the films are processed and original package shipment altered after arriving in Utah. The contracts of booking as to specific time and place are determined after such arrival, under transportation contracts between the film exhibitor and the carrier, and frequently, under exhibition contracts which are executed subsequent to the film arrival and showing in Utah. Even in those instances where an exhibition contract is executed prior to the time of arrival of the film in the state, there is an analogy to the Standard Oil Company case, which points out that 95% of the fuel oil sold by Standard Oil was on contracts executed before the oil had been shipped from point of origin, and many of which extended for a period of one year in advance. The decision likewise points out that at the time of the shipment of the oil, the Standard Oil Company did not know where any particular cargo or part would go, to whom it would go, or when it would be shipped. Again, there is a striking analogy to film transportation, where likewise when the film is shipped from out-of-state laboratories to Utah, the distributing company does not know the destination to which a particular portion of the reassembled film will go, nor to whom it will go nor the date of such further shipment. This is equally true whether the exhibition contract is made prior to or after arrival in Utah, as the Record is very clear that in practi-

cally all instances the booking arrangements setting up [fol. 113] the time and place of exhibition, and therefore of transportation, are made long after film arrival. In this connection, we should point out that as to a very limited part of the film shipments, namely, news reels,* there are instances where film is shipped from New York or California in an exhibiting condition, without processing or checking, and directly to the exhibitor for showing at a specific time and place. In this aspect, news reel handling is entirely distinct from other types of film.

The decision further goes on to point out that the determination of whether transportation is inter or intrastate must be determined by the essential character of the transportation, not by mere billing or other forms of contract, although these may be one of a group of circumstances relevant to the determination. The opinion Specifically states, at page 268:

> "The reshipment of an interstate or foreign shipment does not necessarily establish a continuity of movement, or prevent a shipment to a point within the same state from having an independent or intrastate character, even though it be in the same course."

The opinion specifically states that the Court had no hesitation in saying that the nature of the transportation was intrastate, and in view of the close relation of facts between the oil in that case and the film in this case, it is difficult to see upon what basis the opinion can cite the Second Standard Oil Case in support of its conclusion that the film transportation, excepting possibly news reels, is interstate.

The Supreme Court in this Second *Standard Oil Case* cited with approval an earlier Circuit Court case, as to which certiorarai had been denied, *Atlantic Coast L. R. Co.* [fol. 114] *v. Standard Oil Co.*, 12 F. (2d) 541, Cert. Den. 273 U.S. 712, known as the First *Standard Oil Case*. This earlier case has likewise been long recognized as one of the leading federal cases on the subject. Factually, it is very similar to the Second *Standard Oil Case*.

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* See discussion of *Transway Case* in later part of this brief for Status of Newsreels.

The Court in this First *Standard Oil Case* cited with approval at page 545, the following language from an earlier U. S. decision—(*B. & O. S. W. R. Co. v. Settle*, 260 U. S. 166):

> "The mere fact that cars received on interstate movement are reshipped by the consignee, after a brief interval, to another point, does not, of course, establish an essential continuity of movement to the latter point. The reshipment, although immediate, may be an independent intrastate movement. The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began. * * *"

The Court further stated at page 546:

> "And in closing the opinion, the court used the language heretofore quoted, to the effect that there are many instances where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, *even though some further shipment was contemplated when the original movement began, and that shipments to and from distribution points* often present this situation.
>
> "The argument that complainant had in contemplation the shipments to its substations at the time of the transportation to Wilmington, and that therefore the shipments from Wilmington constituted one movement with the interstate shipment to that point, has an ele- [fol. 115] ment of plausibility, but it is answered by the distinction drawn by Justice Brandeis in the Settle case, to which we have just adverted. And that intention to make further shipment cannot convert what is essentially an intrastate shipment into interstate commerce has been expressly adjudicated by the Supreme Court in another case, *Southern Pacific Co. v. Arizona*, 249 U. S. 472, 39 S. Ct. 313, 63 L. Ed. 713."

The decision also makes a distinction which the opinion of this Court seems to have entirely overlooked, and that is *between the essential nature of the business* and *the*

essential nature of the transportation involved. Many of the films shipped from the Salt Lake Exchange are destined for other states, and as to these, we believe there can be no question but that such a shipment is interstate transportation. Because of this, in many instances the film distribution business might be characterized as interstate in nature, but as to the film transportation from and to the Exchange in Utah to exhibitors in Utah, and between exhibitors within the same state, we are not concerned with the essential nature of the business, but with the essential nature of the transportation involved.

In the First *Standard Oil Case*, supra, confirmed by the Second *Standard Oil Case*, supra, the Court distinguished between cases concerned with the essential nature of the business and cases concerned with the essential nature of the transportation.

The Court stated at pages 547 and 548:

> "That there is a difference in the principles applied to the two classes of cases is apparent at a glance. In the one case it is the essential nature of the business which governs; in the other it is the essential nature of the particular transportation involved If a group of merchants buying and selling goods in interstate commerce should conspire to raise prices, they would unquestion- [fol. 116] ably be amenable to prosecution under the Sherman Act; but this would not authorize a transportation company to charge interstate rates on a shipment of goods which one of the merchants might make to another within the same state. As said by Judge Sibley in A.C.L. R.R. vs. R.R. Commission of Georgia (D.C.), 281 Fed. 321
>
> " 'While the business of buying and selling goods, interstate commerce may reach all the way from first purchase to final delivery, interstate transportation for the purpose of determining the rate to be charged may have narrower limits.' "

We trust that the foregoing will sufficiently amplify and justify our previous statement that in citation of this authority to determine the nature of the transportation of films in this case, the opinion has misconstrued either the

facts or this authority, which held that the transportation involved was intrastate in character.

As a companion citation to the *Standard Oil Company Case*, supra, the opinion cites *United States v. Erie R.R. Co.*, 280 U S. 98. While in a very broad sense this case contains general language which may have a bearing on the decision, it remains that the facts upon which this case is based are entirely different from those of the instant case. There, a company offer- to buy pulp manufactured abroad from a New York broker who was a commission agent for foreign mills. The offer was cabled to the foreign mill, naming the purchaser. Upon acceptance, the broker informed the company and contracted with it in his own name, sending a copy to the mill providing for shipment from abroad during a specified period, and delivery to the United States. Upon receipt of shipping information, the broker relayed it to the company. The broker paid the mill as soon as he was advised of shipment, and the bill of lading was sent to him. Upon pulp arrival in Hoboken, New Jersey, the broker made [fol. 117] out bills of lading for shipment from that point to the company at Garfield, New Jersey. The Court pointed out that the broker acts only as an agent, and that in this case, there is a continuing intent that the pulp be transported from the steamer to Garfield, and the transportation is therefore a part of *Foreign* commerce. It will be observed that there are in this case none of the incidents found in film transportation and detailed above in the comments on the Standard Oil Case.

It will also be observed that in the *United States vs. Erie R.R. Case*, supra, there was no distribution of the pulp involved nor stoppage of the shipment except momentarily for rebilling at Hoboken, New Jersey, where the same broker that had imported the shipment of pulp and had paid the steamship transportation charges, appeared and rebilled the shipment to Garfield, New Jersey, and paid the added transportation charges, a clear and unequivocal example of a continuous movement under a common arrangement and almost identical with the facts in the leading case of *B. & O. R. S. W. Co. v. Settle*, 260 U. S. 166. In both cases, a rebilling arrangement was attempted in order to defeat a through rate. Neither case has any facts in common with the instant case.

The opinion further points out that Elliott S. Windward of RKO Pictures, Inc., testified that the film distributor exercised control over the carrier employed to transport the film from the exchange to the theater-exhibitor. Reference is made in the opinion, and in support of such contention, to the testimony at page 50 of the Record, wherein Mr. Windward does state that the Carrier must be properly bonded and insured. It is upon this factual premise, apparently, that the Court concludes there is a retention of control over the entire journey of the film transport within Utah, and that because of this control, the film could not be said to have come to rest at the exchange. As has been [fol. 118] detailed above, in the first assignment, all witnesses testified that the selection and payment of the local film carrier is left within the control of the theater-exhibitor. An examinatioin of Mr. Windward's testimony at the same page (50) of the Record clarifies this, particularly the following language:

> "Q. Who determines which method of transportation will be employed?
> "A. The Exhibitor."

Witness McMahon of Republic Pictures also clarifies it at page 61 of the Record:

> "Q. Now the billing that is done with regard to the film is usually according to the exhibitor's wishes, isn't it?
> "A. The exhibitor enters into the agreement with the common carrier—we don't."

Witness Walker of 20th-Century Fox also clarifies it at page 71 of the Record:

> "Q. And as a general business practice with your company, in all cases, the transportation contract is between the exhibitor and the carrier?
> "A. It is between the exhibitor and carrier."

In view of the repeated assertions of the Record in regard to this, it would seem obvious that there is a misconception of the actual facts of this local carriage, and that what Windward did say was that the exhibitor should select

and make the transportation arrangements with any qualified carrier.

[fol. 119] Following this factual assertion, the opinion again points out that the contracts contemplated a continuous transportation of film, and cites in support of such conclusion four cases, including *Republic Pictures Corporation* v. *Kappler*, 151 F. (2nd) 543, hereinafter called the Kappler Case. This case concerned an action brought by an employee to recover for overtime pay under the provisions of the Fair Labor Standards Act, and upon the theory that the business in which his employer was engaged was in interstate commerce.

Kappler was employed by Republic Pictures Corporation at the Des Moines distributing office, which agency handled films to points both in the State of Iowa and outside of that state. This employee was a booker concerned with the booking of the films. He also contacted the transportation companies and other agencies to whom the films might be delivered for transportation. The Court concluded that this employee's services were essential and that he was engaged in commerce, the word used in the Fair Labor Standards Act, and the principal part of his activities were in such employment. This case is clearly inapplicable so far as the facts are concerned. In the first place, the Court was concerned with a definition of the term "in commerce" as set out in the Fair Labor Standards Act of 1938. The definition of commerce from Section 3 of the Act is set forth in the opinion at page 544, as follows:

> "Commerce means trade, commerce, transportation, transmission or communication among the several states, or from any state to any place outside thereof."

The same section of the Act also provides:

> "An employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, [fol. 120] transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any state."

As the Court pointed out, and it seems obvious from the pertinent provisions of the Fair Labor Standards Act, the

problem is not strictly a definition of interstate transportation in the sense with which we are concerned, but is in reality much broader, and in fact a definition of an interstate business. This distinction was specifically pointed out by the Court in the First *Standard Oil Case*, supra. The opinion in the *Kappler Case* further states, at page 545, that plaintiff's contacts with and participation in interstate commerce were substantial, which apparently is sufficient for purposes of the Act. This might well have been the case, since a generous portion of his time was devoted to the shipment of films outside the state of the exchange, which would clearly be in interstate commerce. It should also be noted that this employee contacted the transportation companies to whom film was delivered. Whether or not the Court had in evidence the Republic Picture contract received as plaintiff's Exhibit I in this case cannot be determined, but in view of the language, this seems entirely possible. As we pointed out in the factual analysis in Assignment I, the Republic contract in this regard is different from at least one other major film distributor, and if it be concluded that it gives the distributor the right of control over the local transportation, is contrary to the testimony of every witness in this case who testified on the subject. For these reasons, it is submitted that the *Kappler Case* is not authority for the conclusion of the Court that under the facts of this opinion, there was a contemplated and obligated continuous transportation of film from distributor to exhibitors and back.

[fol. 121] The second case cited by the Court as additional authority for the same conclusion is *Beggs* v. *Kroger Co.*, 167 F. (2d) 700. In this case, defendant Kroger Company operated retail food stores in Arkansas, and maintained a warehouse at Little Rock through which merchandise sold in the retail stores passed. Substantially all of the merchandise received at the warehouse was from without Arkansas. It was unloaded, placed in the warehouse, sorted in lots, and then distributed to the various company-owned stores in Arkansas in company owned trucks. The warehouse was merely a repository of the merchandise beside the railroad yards until the trucks could move it

to the stores. The drivers of the trucks claimed pay and hours of labor under the Fair Labor Standards Act, and the question arose as to whether or not these drivers were subject to this Act or to the Motor Carrier Act of 1935.

The Court held that these drivers were engaged in an interstate transportation, the regulation of which had been given to the Interstate Commerce Commission, because the warehouse, like any railroad warehouse, was merely an instrument of transportation facilitating the transfer of the merchandise from rail carrier to motor carrier. The facts, moreover, are distinctly different from those of film transportation, and there was no selection of carrier by the consignee, nor actual processing of the goods in the warehouse, except as a divisional matter, and no booking negotiations, or trade screenings or sales of film. The entire movement was clearly subject to the control of, and actually made by, the Kroger Company.

The motion picture exchanges in Salt Lake City are definitely not instrumentalities of transportation, and are not merely warehousing organizations. They are distribution centers for national distributors of films and their activities must be appraised under Court decisions applicable to distribution. It is respectfully submitted that this decision is not authority for the conclusion reached by the Court, based upon the facts of film transport as evidenced by the Record.

[fol. 122] The opinion likewise cites a third case of *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, to the point that a convenient intermediate halt in a movement of goods in process of getting them to their final destination, leaves such goods "in commerce" until they reach that destination. This case, like the Republic Pictures Corporation case, arose under the provisions of the Fair Labor Standards Act, and was a suit brought by the administrator of the United States Department of Labor to restrain violations of the Act. As the Court pointed out at page 567:

> "It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce."

The Court in emphasizing the broad aspects of the Fair Labor Standards Act quoted the remarks of Senator Borah respecting jurisdiction under the Act, page 567:

> "If the business is such as to occupy the channels of interstate commerce, any of the employees who are a necessary part of the carrying on of that business are within the terms of this bill, and, in my opinion, are under the constitution of the United States."

Moreover, in the *Republic Pictures* v. *Kappler Case*, supra, the Court stated in substance that the applicability of the Act, (Fair Labor Standards Act) is dependent upon the character of the employee's work and if a substantial part of that work is related to goods moving in part or entirety in interstate commerce, the employee is covered by the Act. It would again seem that the Court is engaged with a determination of the existence of an interstate business, and is applying standards set forth in the Fair Labor Standards Act itself. The facts, moreover, were concerned with what might be described as a general paper brokerage business. Again, there is nothing to indicate active [fol. 123] processing of the goods, or other of the distinguishing incidents of film transportation which have been repeatedly detailed above. As a matter of fact, the Court determined in this case that interstate transportation terminated before resale and that further transportation within a state was intrastate transportation.

The fourth and last case cited in the opinion of the Court is *Transway, Inc.* v. *Exhibitors Delivery Service, Inc.*, 51 M. C. C. 263 known as the *Transway Case* decided February 2, 1950, by the Interstate Commerce Commission. We have no argument with this case. It supports our contentions throughout this petition and brief.

The Transway Case held that the transportation of newsreels between points wholly within the State of Louisiana was interstate transportation for the reason that the *newsreels*, like newspapers, are good for a very limited period, generally thirty days, and it is essential to arrange in advance for the exact dates on which exhibitions thereof are to commence, and the exact theater destinations. The contracts between the film companies and theater-exhibitors

respecting newsreels cover a period of fifty-two weeks each year and provide for the delivery of one or two newsreels each week and specify the *exact* days of each week for delivery of the newsreels at named theater destinations. These contracts are made prior to the delivery of any newsreels and approved by the National offices of the film distributors, and thereafter the only duty of the local film exchange is to draw a chart or schedule of deliveries of the newsreels from these contracts and see to it that films [fol. 124] are delivered directly to the destinations named in the contracts on the exact days named in the contracts. The case makes a specific point of these facts and the added fact that no newsreels are stocked in the vaults of the branch exchange offices at any time. Newsreels do move in an almost continuous circuit during the thirty days of showing, and thence back to the exchange, and back to the laboratories for junking.

The Commission said:

> "Newsreel prints are shipped to New Orleans pursuant to a preconceived intention to move all of them to various exhibitors and from one exhibitor to another in Louisiana * * * in conformity with contracts previously entered into, which, as noted, provide for the dates on which the contracting exhibitors were to show the newsreels."

The Commission held that at the time the newsreels were shipped from out-of-state points to New Orleans there existed a contractual obligation to see to it that the newsreels were delivered at named theater-exhibitor destinations on exact named dates. In fact, as brought out in the instant case, newsreels often are shipped direct from out-of-state points to the first theater-exhibitors rather than to the exchange and from thence to other theaters.

If reference is made to page 7 of the Record herein, it will be found the appellees, defendants below, admitted the interstate character of newsreel transportation where they are handled in the same manner as set forth under the factual statements in the *Transway Case*, as follows:

> [fol. 125] "If plaintiff intended to state, 'That the transportation of motion picture newsreels has been

designated by the Interstate Commerce Commission as being interstate "in character",' then defendants will admit that the Interstate Commerce Commission has so held where the facts underlying said interstate transportation of newsreels are identical with the facts set forth in the case decided by the Interstate Commerce Commission known as Transway, Inc. v. Exhibitors Delivery Service."

Also it should be observed, since the Court herein has cited the *Transway Case* as authority for the opinion herein, that the Interstate Commerce Commission in deciding the *Transway Case*, confirmed its own decision in a former case known as *Film Transit Case*, (7 Motor Carrier Cases 485). The *Film Transit Case* had to do with the transportation of *all types of motion picture film* from distributor exchanges located in Memphis, Tennessee to theaters in Tennessee. The facts stated in the *Film Transit Case* are almost identical with the facts in the instant case except for exchange screening of pictures before sale, and the Commission at page 496 of the report (Motor Carrier Cases) stated:

> "It does not appear that any particular print is earmarked for delivery to any particular exhibitor or group of exhibitors. While the contracts with the exhibitor for the showing of the prints (films) are usually made sometime prior to their receipt at Memphis, the respective dates on which they are to be shown by the several exhibitors are fixed later, and in many instances after the arrival of the prints at Memphis. It is apparent, therefore, that when the prints reach Memphis from New York, that there is [fol. 126] no existing intention to move any particular print to any particular point or group of points beyond Memphis. Consequently, we are of the opinion that the transportation between Memphis and other Tennessee points over *intrastate routes is intrastate in character.*

"The Interstate Commerce Commission is not a judicial tribunal. However, the appellees and intervenors herein commend to the Court the decisions of the Interstate Com-

merce Commission in the *Film Transit Case* and the *Transway Case*, supra.

They are both sound, and founded upon well established principles of law relating to the question of inter-intrastate transportation, and are prepared by a Federal tribunal which has been dealing with Federal transportation problems for more than half a century. A careful reading of these two cases will give a clear and complete picture of the national and local film transportation problem.

Conclusion

In conclusion, it is respectfully submitted that the Court has misconstrued salient facts of transportation in the film industry, as evidenced in the Record, and has likewise determined the existence of interstate transportation upon the authority of a number of federal decisions which in actual fact are diametrically opposed to the conclusions reached in the opinion. For these reasons, and because of the far-reaching and significant nature of this decision, it is submitted that a rehearing should be granted to the [fols. 127-128] end that the decision of the District Court be affirmed, with the possible exception of the determination that the usual transportation of newsreels is intrastate commerce.

Respectfully submitted,

Of Counsel:

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[File endorsement omitted.]

[fol. 129] SUPPLEMENTAL OPINION—March 19, 1952

Before Phillips, Chief Judge, Huxman and Murrah, United States Circuit Judges.

HUXMAN, Circuit Judge:

Appellees have filed a petition for rehearing on the ground as alleged therein that the opinion of the court misconstrues and ignores fundamental and controlling facts and that the opinion presumes and is predicated in part on the presumption "that the film is neither within the State of Utah nor released for exhibition to the public at the time the contract is executed." An opinion speaks for itself and the fact that it may be misconstrued does not ordinarily require an opinion in support of an order denying a petition for rehearing, but in this case we feel that a statement is warranted, not only because we feel that the basis of the opinion is misconstrued, but also because the petition for rehearing in setting out evidence, which it is claimed we ignored, perhaps inadvertently omits a part of the testimony of some witnesses which is essential to place such testimony in proper focus. To overcome the statement in the opinion that the distributors exercise control over the transporting agencies selected by the exhibitor to transport the film from the exchange to the theatre, petitioners quote the following from the testimony of Elliott S. Windward of R.K.O. Pictures, Incorporated:

"Q. Who determines which method of transportation will be employed?

"A. The Exhibitor."

For some reason petitioners overlooked the questions and answers which immediately follow the above question and answer, as follows:

"Q. Can you state whether or not your office exerts any control over what shipper will be employed? Must certain requirements be met by carriers for you to release films to it?

[fol. 130] "A. He must have the proper credentials involving insurance and protection of the prints

while in his possession; he must be a licensed carrier, and *he must also be approved by our home office.*

"Q. The home office requires approval?

"A. Yes."

But whether the distributor exerts or fails to exert supervision over the carrier delivering the film from the exchange to the exhibitor's theatre was but one factor considered in the opinion. It is neither possible nor wise to set out in detail all the evidence upon which the court's conclusions are based. There is much criticism by the legal profession that opinions are too long and detailed and thus unduly encumber legal publications with matter that is of no subsequent value.

The basis of our opinion is that if there is a continuing intent that these films shall be transported until they reach their journey's end from whence they started, the entire journey is a continuing one, notwithstanding that there may be a temporary stoppage in transit for some particular purpose or purposes. We think the decisions by the Supreme Court cited in the opinion support this statement of the law. We are still of the view that when this yardstick is laid along side of the basic facts in the case they support our conclusions.

The opinion does not assume, as stated in the petition for rehearing "that the films are sent to the theatre exhibitors upon a completely pre-determined schedule." On the contrary, as pointed out, the opinion is predicated on the ground that the contracts between the distributor and numerous exhibitors all contemplate that a film will be sent from the distributor to the exchange and there will be delivered to an exhibitor and by him in turn be delivered to the next selected exhibitor and so in turn to all the exhibitors, until the last exhibitor by his contract is obligated to return it to the exchange.

Neither do we think the record sustains the point petitioners make that contracts for a film are not made until the film arrives at the exchange and the exhibitor has had an [fol. 131] opportunity to screen or see the film. Such a conclusion would mean that a separate contract would be executed with respect to each film, selected only after the film had reached the exchange and had there been viewed

by the exhibitor. We think the record is without dispute that most, if not all, contracts are contracts covering a considerable period of time; that in many instances they are made before the film has been completed and at least before it is ready for delivery for exhibition and that they are executed prior to the time the exhibitors see any particular film or before the film has reached the exchange in Salt Lake City.

It is without dispute that all of the distributors have salesmen who go out in the territory and solicit business. They have no power to make a binding contract. All proposed contracts must be submitted to the distributor for approval. Thus, Wade, Representative of Universal International Film Exchange, testified that his company dealt in news reels and feature films; that sales representatives covered the territory, contacting the individual theatres for the sale or licensing of the films; that they wrote up the contract, submitted it to him and that he in turn submitted it to the home office and that this procedure applied to every subject. He testified that not all the films covered by the contracts were in his possession when it was executed; that the contracts were made prior to the actual shipment from the laboratory to him; that in many instances the film had not yet been produced when the contract was made. He testified further from his personal knowledge and experience that other exchanges handled the distribution of film in the same manner.

Windward, R.K.O. Representative, testified that there were different procedures for bookings; that salesmen secured a date and submitted it to the office; that the local office had no power to make a contract; that only New York had that power and that the home office also determined the play date of a picture. Walker, Branch Manager for Twentieth Century Fox, testified that on short subjects they wrote a contract on the basis of a year covering the entire product; that the March of Time was sold on a yearly basis and that such contracts are generally executed prior to the [fol. 132] production of the subjects concerned therein. He did testify that they seldom solicited an account on feature products until they first had a trade showing, but his testimony makes it clear that the film in such cases had not come to rest so as to terminate the interstate transportation

thereof; that at these trade showings there was present only one print. It is clear from his testimony that such print was not there for delivery to a purchaser, but only for exhibit to prospective purchasers. The record is devoid of any evidence showing that the distributors accumulate a stockpile of films in the exchanges, where the exhibitors may go, make their selection, purchase what they want, and take it with them, as you do when you go to a retail merchandising store.

We adhere to our conclusion that the record makes it clear that the contracts between all the exhibitors and a distributor contemplate a continuing movement of a film from the distributor through the exchange to all of the exhibitors and from the last exhibitor back to the distributor from whence it came, interrupted only temporarily at the exchange for purposes of mutual benefit to all the parties.

The petition for rehearing is denied.

IN UNITED STATES COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING.—March 19, 1952.

This cause came on to be heard on the petition of appellees for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

IN UNITED STATES COURT OF APPEALS

NOTE RE MANDATE

On March 31, 1952, an order of the United States Court of Appeals was entered staying the mandate of the said court for a period of thirty days from that day under provision of paragraph 3 of rule 28 of said court.

[fols. 133-134] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 135] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 741

[Title omitted]

ORDER ALLOWING CERTIORARI.—Filed June 9, 1952.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. Counsel are requested to discuss on briefs and oral argument the question whether a single judge had jurisdiction to hear and determine this case in view of section 2281 of Title 28 of the United States Code.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.